S. Hrg. 98-275

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT AND THE VA'S FISCAL YEAR 1984 MAJOR CONSTRUCTION PROJECT PROPOSALS

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 636 and Related Bills

MARCH 23, 1983

Printed for the use of the Committee on Veterans' Affairs

24-541 O

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1983

S761-8

COMMITTEE ON VETERANS' AFFAIRS

ALAN K. SIMPSON, Wyoming, *Chairman*

STROM THURMOND, South Carolina
ROBERT T. STAFFORD, Vermont
FRANK H. MURKOWSKI, Alaska
ARLEN SPECTER, Pennsylvania
JEREMIAH DENTON, Alabama
RUDY BOSCHWITZ, Minnesota

ALAN CRANSTON, California
JENNINGS RANDOLPH, West Virginia
SPARK M. MATSUNAGA, Hawaii
DENNIS DeCONCINI, Arizona
GEORGE J. MITCHELL, Maine

CONTENTS

Page

Opening statement of Hon. Alan K. Simpson, chairman of the Senate Committee on Veterans' Affairs 2

Bill S. 636*, as reported by the Committee on Veterans' Affairs:

Text of 18
Introductory statements of Hon. Gary Hart, Hon. Alan Cranston, and Hon. Alan K. Simpson, excerpts from the Congressional Record, vol. 129, No. 23, pp. S1894-S1898—Senate, March 1, 1983 50

Agency reports of—

Department of Justice (No. 29, May 20, 1983) 53
Veterans' Administration (No. 32, June 1, 1983) 57

Testimony of—

John P. Murphy, General Counsel, Veterans' Administration, accompanied by Kenneth E. Eaton, Chairman, Board of Veterans' Appeals; Max R. Woodall, Director, Compensation and Pension Service; and Edward J. Lukey, Deputy Assistant General Counsel 64
Frederick Davis, past chairman, Committee on Veterans, Section of Administrative Law, American Bar Association and dean, University of Dayton School of Law, Dayton, Ohio, accompanied by William H. Allen, member of the District of Columbia Bar 135
William F. Sullivan, Associate Deputy Administrator for Logistics, Veterans' Administration, accompanied by Dr. William J. Jacoby, Jr., Deputy Chief Medical Director; William Salmond, Assistant Deputy Administrator for Construction; Roy McCracken, Director, Department of Medicine and Surgery's Facility, Engineering, Planning and Construction Office; Gerald E. Neumann, Director, Program Control and Analysis Staff; Dr. Murray G. Mitts, Director, Program Analysis and Development; and John P. Murphy, General Counsel 161
Dr. O. David West, fellow of the American College of Hospital Administrators, Hospital Corporation of America, Nashville, Tenn 195

Written statements of—

Hon. Alan K. Simpson, chairman of the Senate Committee on Veterans' Affairs 5
Hon. Gary Hart, a U.S. Senator from the State of Colorado 10
Hon. Robert T. Stafford, a U.S. Senator from the State of Vermont 14
Hon. George J. Mitchell, a U.S. Senator from the State of Maine 15
John P. Murphy, General Counsel, Veterans' Administration 91
Hon. Frank H. Murkowski, a U.S. Senator from the State of Alaska 132
Frederick Davis, dean, University of Dayton School of Law, and past chairman, Committee on Veterans, Section of Administrative Law, American Bar Association 141
William F. Sullivan, Associate Deputy Administrator for Logistics, Veterans' Administration 173
Robert E. Lyngh, director, National Veterans Affairs and Rehabilitation Commission, The American Legion 213
James N. Magill, special assistant, National Legislative Service, Veterans of Foreign Wars of the United States 227

*See S. Rept. No. 98-130 (98th Cong., 1st Sess.), incorporating portions of the Committee Report on S. 349 (the predecessor of S. 636 in the 97th Congress), S. Rept. No. 97-466 (97th Cong., 2d Sess.). On June 15, 1983, the text of S. 636 was passed by the Senate as an amendment to H.R. 2936, and S. 636 was indefinitely postponed. See Congressional Record, Vol. 129, No. 85, p. S8488—Senate, June 15, 1983.

Written statement of—Continued
Page
- Donald H. Schwab, director, National Legislative Service, Veterans of Foreign Wars of the United States 231
- John F. Heilman, national legislative director, Disabled American Veterans 237
- Charles E. Joeckel, Jr., deputy national legislative director, Disabled American Veterans 260
- R. Jack Powell, executive director, Paralyzed Veterans of America 270

Questions and Answers—
- Response to written questions submitted by Hon. Alan Cranston, ranking minority member of the Senate Committee on Veterans' Affairs, from:
  - Veterans' Administration 105, 186
  - American Bar Association 157
- Response of Dr. O. David West, fellow of the American College of Hospital Administrators, Hospital Corporation of America, Nashville, Tenn., to written questions submitted by:
  - Hon. Alan K. Simpson, chairman of the Senate Committee on Veterans' Affairs 204
  - Hon. Rudy Boschwitz, a U.S. Senator from the State of Minnesota 211

Letters to Hon. Alan K. Simpson, chairman of the Senate Committee on Veterans' Affairs, from:
- Leland E. Beck, counsel, Administrative Office of the United States Courts, dated April 19, 1983 324
- Loren A. Smith, chairman, Administrative Conference of the United States, dated May 6, 1983 327
- Stanley N. Zwaik, national commander, Jewish War Veterans of the United States of America 329
- George F. Hennrikus, Jr., director, legislative affairs, the Retired Officers Association, dated March 22, 1983 330

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT AND THE VA'S FISCAL YEAR 1984 MAJOR CONSTRUCTION PROJECT PROPOSALS

WEDNESDAY, MARCH 23, 1983

U.S. Senate,
Committee on Veterans' Affairs,
Washington, D.C.

The committee met, pursuant to notice, at 3:35 p.m., in room SR-418, Russell Office Building, Hon. Alan K. Simpson (chairman of the committee) presiding.

Present: Chairman Alan K. Simpson (presiding), Senators Alan Cranston, Strom Thurmond, Frank H. Murkowski, and Rudy Boschwitz.

Senator **Cranston** [presiding]. The committee will please come to order. I am going to take the liberty of starting in the absence of the chairman, and I thank all of you for your presence. I welcome you to today's hearing on judicial review legislation and the VA's fiscal year 1984 major construction project proposals.

With reference to judicial review, I was delighted by the broad bipartisan support that was demonstrated in the list of original cosponsors on S. 636, including 10 members of this committee. The bill as passed by the Senate last year and now before the committee is good legislation. It has been through a long developmental process and important changes have been incorporated at a number of points, particularly during the last Congress when we further modified the scope of review and attorneys' fees provisions so as to achieve our intention in a more precise manner.

Although the legislation has been improved over the years, in part as the result of a great number of important technical suggestions from the VA, I regret that the administration's testimony on it has failed to keep pace.

Four years ago, in the VA's thorough and scholarly review of the issues, the agency expressed no opposition to providing for judicial review and was in some respects supportive of the bill. Today's VA testimony is totally negative and most regrettably presents, in a number of respects, misleading arguments and distortions. In questions that I will ask today or submit for the record I will attempt to clarify some of these points in order to set the record straight.

At this point, however, I would like to provide some balance to the VA's use in its prepared statement of the 1977 study by the Center for Administrative Justice of the social security adjudication process. The VA cites this study in support of its opposition to S. 636. Without going into the points made by the VA about this study, because there are numerous issues that must be clarified to do so, I think it is important to note some points about judicial review made by the study's authors that the VA does not cite.

The study authors in the course of their analysis of the merits of judicial review states:

> Accuracy apart, however, judicial review promotes other values, too. For one thing, it performs a legitimizing function. The fact that an unfavorable administrative determination is subject to scrutiny by an independent Federal judiciary may enhance the disposition of claimants and the interested public to accept the fairness of the process and the justness of its outcome. Second, court decisions afford the Agency a steady stream of reasoned, sharply focused criticism and feedback, useful for purposes of self-improvement. This is valuable both for its own sake and as possible generator of greater accuracy and fairness. Third, court decisions serve as a window on an agency, the operations of which would otherwise be largely invisible. Court decisions open the disability process to public view, defining and sharpening issues that might never otherwise have surfaced,

And still I am reading this quotation—

> There is one additional factor that may alone justify retention of judicial review in Social Security disability cases. Judicial review even on questions of fact is provided by statute to citizens aggrieved by nearly all other types of formal Federal administrative action. To make an exception for disability claimants, a peculiarly disadvantaged and dependent group, would be viewed perhaps rightly as a mark of disregard for their welfare. Witness, for example, the widespread criticism of the lack of judicial review of Veterans' Administration benefits decisions.

These positive assessments of the value of judicial review from the Center's study closely parallel some of the reasons why I support judicial review legislation for veterans.

With respect to the VA's fiscal year 1984 construction proposals, I would note that I will be submitting questions for the record. Generally, I believe that the VA's request that the committee approve this year 36 projects estimated to cost $175 million is realistic and appropriate.

Mr. Chairman, I would like to ask that my introductory statement on S. 636 along with yours and Senator Gary Hart's be printed at the appropriate place in the hearing record.

Chairman SIMPSON [presiding]. Without objection, so ordered.

Senator CRANSTON. I hope you will forgive the brief coup d'etat.

Chairman SIMPSON. I used to do it to you. Don't you remember? With your permission, of course, like you did. Thank you.

Good afternoon. I apologize for being late and I really know of your deep and abiding interest on this issue. You have been right in the middle of this one for a long time—judicial review—and I joined with you in that when our roles were reversed, and I thank you for that.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, CHAIRMAN OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Chairman SIMPSON. I welcome all of you here for this hearing to have a review of S. 636 introduced by Senators Cranston and Hart and myself. I just will make this short statement and enter my full statement in the record without objection.

In the construction area we will have testimony regarding the projects in the administration's fiscal year 1984 budget and the so-called revalidation process under which these projects were developed and selected for inclusion. We will examine the criteria used for fiscal year 1985 and beyond for establishing the scope, type, location, and relative priority of the projects.

We will hear several people on planning and construction both from the VA and the private sector: Mr. Sullivan and Dr. Jacoby of the VA, and Mr. David West from the Hospital Corporation of America who was a VA consultant during his sabbatical.

We will start with the testimony on the judicial review issue. That aspect should, I think, be relatively brief because we have washed that laundry many times before in this place. It is almost identical to S. 349 which was unanimously reported out of the committee and passed by the full Senate in September 1982.

I think the improvements made by the bill go a long way toward making the adjudicatory rights of claimants before the VA very comparable to the rights of claimants for all other kinds of Federal benefits, particularly in the area of judicial review and attorneys' fees. We look forward to receiving the testimony of the various veterans' organizations and the representatives of the VA and Mr. Davis of the University of Dayton School of Law as well as the Administrative Conference of the United States and the Administrative Office of the U.S. courts.

Without objection, their statements as presented will be included in the record of this hearing.

I welcome you today, and thank you, for opening the proceeding. I do appreciate that, and Strom Thurmond, Senator Thurmond, do you have any opening statement you might want to make, sir?

Senator THURMOND. Thank you. I have about 3 minutes, Mr. Chairman.

Mr. Chairman, it is a pleasure to be here today to receive testimony on S. 636, the Veterans' Administration Adjudication Procedure and Judicial Review Act, and the Veterans' Administration medical construction program.

Mr. Chairman, as you know, S. 636 is not the first legislation to be considered by our committee which has proposed to permit judicial review of decisions by the Board of Veterans' Appeals. During the 96th Congress the committee reported S. 330, and during the 97th Congress, S. 349, both of which were subsequently passed by the Senate.

During our consideration of these bills I expressed my concern that by permitting judicial review of factual findings of the Administrator of Veterans' Affairs we might impose an unnecessarily heavy burden on the Federal court system both in terms of added caseload and lack of judicial familiarity with the particular types of factual questions involved in the VA claims determinations.

Mr. Chairman, last year prior to passage of S. 349 on the Senate floor, I asked for and received your assurances that every effort had been made to refine and narrow the scope of review in that legislation. The bill before the committee for consideration today contains the identical review clause that was in S. 349. I must admit that on its face this review standard, provided in section 4026(a)(1)(D), appears to be a very narrow provision. However, it is difficult to say with any certainty how this provision will be construed by the Federal court and the effect which it will have on the caseload of the Federal court system.

In order to get a better feel for these considerations, I believe it is important that the committee utilize the expertise of the Justice Department, the Administrative Conference, and the Judicial Conference. I ask that the committee request comments from these entities to be included in the record of this hearing.

I appreciate your cooperation, Mr. Chairman, in addressing my concerns on this important matter. I look forward to the testimony on this legislation and the other very important matter that will be discussed today—the medical construction program.

I do have another meeting going on and may have to leave before it is all over. I shall read the record to be informed if I am not here for all the testimony.

Thank you very much, Mr. Chairman.

Chairman SIMPSON. Thank you very much, Strom. We always appreciate your participation. It is very helpful.

At this point in the record, I would like to insert the prepared statements of Senators Gary Hart, Robert T. Stafford, George J. Mitchell and myself, as well as the text of the bill, S. 636, as introduced, the introductory statements and the agency reports thereon.

[The prepared statements of Senators Alan K. Simpson, Gary Hart, Robert T. Stafford, and George J. Mitchell; the text of the bill, S. 636, the introductory statements, and the agency reports thereon, follow:]

PREPARED STATEMENT OF HON. ALAN K. SIMPSON, CHAIRMAN OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Good afternoon, I welcome all of you to this hearing on VA medical construction and the proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, S. 636, introduced by Senators Hart, Cranston and myself.

In the construction area, we will receive testimony regarding projects contained in the Administration's Fiscal Year 1984 VA budget request and regarding the so-called "revalidation" process under which these projects were developed and selected for inclusion in the budget. The Committee will examine the criteria that will be used for FY 1985 and beyond for establishing the scope, type, location and relative priority of each facility.

Section 5004, 38 United States Code, requires Congressional approval for certain construction projects "[I]n order to ensure the equitable distribution of medical facilities throughout the United States, taking into consideration the comparative urgency of the need for services to be provided

IN THE CASE OF EACH FACILITY . . .". WE RECOGNIZE THAT THIS SETTING OF PRIORITIES IS A COMPLICATED PROCESS, WHICH STRONGLY INFLUENCES HOW THE VA WILL ALLOCATE FUNDS FOR CONSTRUCTION. I AM VERY CONCERNED ABOUT THIS PROCESS, ESPECIALLY BECAUSE THE DEMANDS ON THE CONSTRUCTION BUDGET ARE MANY, AND THE NEEDS AND DEMOGRAPHICS OF THE POPULATION THAT IT MUST SERVE ARE NOW UNDERGOING A PROFOUND CHANGE DUE PRIMARILY TO THE "GRAYING" OF THE AMERICAN VETERAN.

IF WE LOOK JUST AT HOSPITALS, WE CAN SEE THE PRESSURE ON THE BUDGET FOR MAINTAINING EXISTING FACILITIES. OF THE VA'S 172 HOSPITALS, ONE HUNDRED THIRTY-NINE (81 PERCENT), WERE BUILT BEFORE JUNE 30, 1955. OF THESE 139, SEVENTY-FOUR (43 PERCENT OF THE TOTAL VA HOSPITALS) WERE CONSTRUCTED BEFORE 1945 AND BEFORE FEDERAL STANDARDS AND REGULATIONS WERE FORMULATED FOR THE HILL-BURTON LEGISLATION WHICH PROVIDED, UNTIL THE LATE 60'S, THE MAJOR U.S. THRUST FOR CONSTRUCTION AND MODERNIZATION OF HOSPITALS AND OTHER HEALTH FACILITIES. THUS, WHILE SOME VA FACILITIES HAVE BEEN RENOVATED AND MEET MODERN HEALTH CARE STANDARDS, MANY HOSPITALS WILL REQUIRE

FURTHER WORK.

IN ADDITION, CHANGES IN THE MEDICAL NEEDS OF OUR NATION'S VETERANS ADD TO THE DILEMMA. THE PRELIMINARY VETERAN POPULATION PROJECTION REPORT OF 1982, PREPARED BY THE VA, INDICATED A 9.5 PERCENT INCREASE IN DEMANDS FOR MEDICAL CARE BY VETERANS BY 1990. WE WOULD WISH TO KNOW HOW THIS PROJECTION WOULD BE INCORPORATED INTO CONSTRUCTION OVER THE NEXT FEW YEARS IF THIS ESTIMATE IS CORRECT, FOR IF IT TRANSLATES DIRECTLY TO PATIENT DAYS SPENT IN HOSPITALS, VA HOSPITALS WOULD BE CALLED ON TO PROVIDE 26,531,000 PATIENT DAYS OF CARE BY 1990. WE WOULD ALSO WISH TO KNOW HOW THE PLANNING PROCESS FOR CONSTRUCTION WILL TAKE INTO ACCOUNT THE FACT THAT THE TYPE OF CARE NEEDED ALSO MAY CHANGE AS A RESULT OF THE AGING VETERAN POPULATION, WHICH IS EXPECTED TO REACH ITS PEAK DEMAND SOMETIME BETWEEN 1990 AND 2000. A MAJOR SHIFT OF THE VETERAN POPULATION TO THE SUNBELT WOULD HEIGHTEN THE PROBLEMS CAUSED BY THESE CHANGING DEMANDS BECAUSE, WHILE FACILITIES OVERALL MAY APPEAR ADEQUATE, THE AVAILABLE BEDS MAY NOT BE OF THE PROPER TYPE OR IN THE PROPER LOCATION.

WE WILL HEAR FROM SEVERAL EXPERTS ON PLANNING AND CONSTRUCTION, BOTH FROM THE VA AND FROM THE PRIVATE SECTOR. AND I PARTICULARLY WELCOME MR. BILL SULLIVAN OF THE OFFICE OF CONSTRUCTION AND DR. BILL JACOBY OF DM&S OF THE VA, AND DR. DAVID WEST OF THE HOSPITAL CORPORATION OF AMERICAN WHO WORKED AT THE VA AS A CONSULTANT DURING HIS 1982 SABBATICAL.

DR. WEST HAS A LONG AND DISTINGUISHED CAREER IN HOSPITAL MANAGEMENT AND PLANNING IN THE FEDERAL AND PRIVATE SECTORS IN THIS COUNTRY AND OTHERS.

TODAY WE HOPE TO RECEIVE YOUR ADVICE AND THE BENEFIT OF YOUR KNOWLEDGE ON HOW BEST TO PLAN THE SIZE, TYPE AND LOCATION OF FACILITIES NOW AND FOR THE FUTURE, AND HOW BEST TO ADMINISTER THE CONSTRUCTION PROCESS TO ENSURE THAT HEALTH CARE IS DELIVERED TO VETERANS THROUGH THE MOST COST-EFFECTIVE ALLOCATION OF THE VA CONSTRUCTION BUDGET.

FINALLY, IT IS IMPORTANT FOR US TO BE BROUGHT UP TO DATE ON THE MINNEAPOLIS AND CLEVELAND PROJECTS WITH RESPECT TO THEIR READINESS FOR CONSTRUCTION IN FY 1983.

WE WILL BEGIN WITH TESTIMONY ON THE JUDICIAL REVIEW ISSUE. THIS ASPECT OF THE HEARING SHOULD BE RELATIVELY BRIEF SINCE THE BILL BEFORE US TODAY, S. 636, IS ALMOST

IDENTICAL TO THE BILL, S. 349, THAT WAS UNANIMOUSLY REPORTED OUT OF THIS COMMITTEE ON JUNE 3, 1982 AND PASSED BY THE FULL SENATE ON SEPTEMBER 14, 1982. I BELIEVE THAT THE IMPROVEMENTS MADE BY THIS BILL WOULD BE MOST HELPFUL IN MAKING THE ADJUDICATIVE RIGHTS OF CLAIMANTS BEFORE THE VA COMPARABLE TO THE RIGHTS OF CLAIMANTS FOR ALL KINDS OF OTHER FEDERAL BENEFITS -- PARTICULARLY IN THE AREAS OF JUDICIAL REVIEW AND ATTORNEYS' FEES.

WE WILL HEAR TESTIMONY ON THIS BILL TODAY FROM REPRESENTATIVES OF THE VA, AND FROM DEAN FREDERICK DAVIS OF THE UNIVERSITY OF DAYTON LAW SCHOOL, A LEADING EXPERT IN THIS AREA. WE WILL ALSO BE RECEIVING WRITTEN STATEMENTS FROM VARIOUS VETERANS' ORGANIZATIONS -- INCLUDING THE AMERICAN LEGION, VETERANS OF FOREIGN WARS, DISABLED AMERICAN VETERANS, AMVETS, PARALYZED VETERANS OF AMERICA, JEWISH WAR VETERANS, THE NATIONAL ASSOCIATION OF ATOMIC VETERANS, AND VIETNAM VETERANS OF AMERICA -- AS WELL AS THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES AND THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS. WITHOUT OBJECTION, THOSE STATEMENTS WILL BE INCLUDED IN THE RECORD OF THIS HEARING.

SO, WE WELCOME YOU HERE TODAY.

PREPARED STATEMENT OF HON. GARY HART, A U.S. SENATOR FROM THE STATE OF COLORADO

Mr. Chairman, I would like to thank the distinguished Chairman of this Committee and other members of the Committee for the opportunity to present testimony supporting my legislation, S. 636, the Veterans Administration Adjudication Procedure and Judicial Review Act.

During the 97th Congress, the Senate passed S. 349, a bill almost identical to S. 636. Through the leadership of Senator Simpson, Senator Cranston and other distinguished members of the Senate Veterans Affairs Committee the center issue contained in this legislation -- the judicial review of Veterans Administration benefit decisions -- has received a thorough hearing in the Senate. Unfortunately, the House Committee on Veterans Affairs has taken no legislative action on this issue in spite of the fact that VA judicial review bills have passed the Senate in the 96th and 97th Congresses.

Mr. Chairman, I first introduced legislation to open the Veterans Administration to judicial review in May of 1976. Since that time I have persisted in my efforts to ensure that the American veteran be afforded all his or her constitutional rights to the due process of law in dealings with the Veterans Administration.

Mr. Chairman, this is the ninth hearing conducted by this Committee on the concept of judicial review of VA decisions. The record established by those several years of hearings by this Committee point to only one logical conclusion . . . the reform of the VA adjudication procedures and granting of the right of judicial review to the American veteran.

Mr. Chairman, as a cosponsor of S. 636, and a supporter of similar legislation in the last Congress, you are aware that the intent of this bill is to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration, to apply certain provisions of the Administrative Procedure Act to the rulemaking procedures of the VA, to provide for judicial review of certain final decisions of the Administrator of Veterans Affairs and to provide for payment of reasonable attorney fees to attorneys rendering legal services to individuals claiming benefits under laws administered by the VA.

Mr. Chairman, the central issue in the debate on this legislation is whether we are going to afford the American veteran the same constitutional rights we grant other citizens in this country. Judicial review is important in granting the veteran adequate protection of his or her rights as a citizen, and it will provide improved oversight of VA procedures and activities by an independent body.

Mr. Chairman, it is becoming increasingly more evident that the preclusion to judicial review and the denial of reasonable attorney fees is based on outmoded assumptions. The Federal courts have been moving in the direction of expanding their jurisdiction over VA actions. For example, in JOHNSON vs. ROBINSON, the Supreme Court held that section 211(a), Title 38 U.S.C. (precluding judicial review) cannot be construed to deny justice to those who challenge the constitutionality of statutes providing veteran benefits.

In 1970, the Supreme Court held in GOLDBERG vs. KELLY that recipients of welfare had a property right to their payments. Welfare was held to be not just a mere "gratuity" but a statutory entitlement. This decision established that welfare recipients have more right to their benefits than veterans since veterans are denied judicial review.

In the case of PLATO vs. ROUDEBUSH, the court determined that section 211(a) does not preclude judicial review of VA procedures in instances where VA pensions were terminated by agency without a pretermination hearing.

In the case of WAYNE STATE UNIVERSITY vs. MAX CLELAND, et. al., the Sixth Circuit Court of Appeals held that section 211(a) is not a bar to judicial review of the constitutionality of rules, and regulations promulgated by the Administrator of Veterans Affairs or his authority to promulgate regulations.

Mr. Chairman, from these recent Federal court cases it is clear that the trend of the Federal judiciary is toward more protection of the due process rights of veterans. It is the responsibility of Congress to take action now to restructure the current VA adjudication procedures to reflect those changes and to protect the rights of all veterans.

Mr. Chairman, S. 636 will bring the Veterans Administration procedures in compliance with the recent Federal court decisions and will grant our veterans, many of whom feel betrayed, their full measure of constitutional rights for which they served this nation.

Again, I appreciate the opportunity to present this testimony on an issue that I remain strongly committed to . . . the rights of the American veteran.

PREPARED STATEMENT OF HON. ROBERT T. STAFFORD, A U.S. SENATOR FROM THE STATE OF VERMONT

MR. CHAIRMAN:

I congratulate you for holding hearings on S. 636 so promptly this year. Again I am a cosponsor and continue to support it enthusiastically.

Twice before, this Committee and the Senate have passed this legislation. The bill is a very fair proposal in my opinion. It would grant the veterans the same rights of appeal presently available to those dealing with other Federal agencies, and permits veterans to employ lawyers in this process at appropriate fees. The bill preserves the Veterans' Administration's appeals process in that a veteran would not be able to go before the Courts without first exhausting the regular VA appeals process. This provision would extend an appropriate right to veterans while protecting the interest of all parties.

I urge the Committee to approve S. 636 and hope it will receive favorable action by the Congress.

PREPARED STATEMENT OF HON. GEORGE J. MITCHELL, A U.S. SENATOR FROM THE STATE OF MAINE

Mr. Chairman, I want to join you in welcoming our distinguished witnesses this afternoon. I, like you, am looking forward to hearing their testimony on S. 636, the proposed "Veterans' Administration's Adjudication Procedure and Judicial Review Act," their testimony on the planning process for medical facility construction of the Veterans' Administration and on specific facility prospectuses proposed in the VA's 1984 Fiscal Year budget. Mr. Chairman, I have a brief statement. Because Judicial Review is the first issue to be covered in testimony, I will address that first.

Judicial Review is not a new issue before this committee -- our involvement with it dates back to the 95th Congress. The present legislation, like the bills that preceded it to this committee, is an attempt to reconcile a wide variety of viewpoints on the issue of judicial review of VA decisions and the related issues of internal adjudication procedures, attorney fees, and VA rule making procedures.

No one suggests that the issue remains before this committee because the Veterans' Administration is guilty of a continuing pattern of unjust or unwarranted decisions on benefit claims. Quite the opposite; I believe the VA's record is commendable. But, given the volume of decisions the VA is called upon to make each year and considering human fallibility, the possibility for error and injustice does exist.

Given that possibility, I feel it is imperative for veterans to have a method of recourse. Since 1933, veterans have been denied access to the method of recourse open to all other citizens -- our court system. This effectively denies veterans and their surviving spouses and children the basic protection of the independent judicial branch of our government.

Many veterans groups testifying before this committee, including those giving testimony last week, have asked Congress to grant them this basic protection. I feel they deserve that right; veterans' benefits are not a matter of largesse--they are rights earned through service to this country.

For that reason, I was a co-sponsor of S. 349 in the previous Congress and I am a co-sponsor of S. 636. So I am particularly interested in our witnesses' testimony concerning Judicial Review.

I am also interested in proposed VA medical facility construction priorities. As the demands on the VA health-care system change, I believe it is crucial for the VA to investigate novel, cost-effective ways of providing our nation's veterans with adequate and responsive care.

Certainly, the way we spend limited dollars on construction, renovation and expansion of medical facilities will have a direct impact on the nature of the care we will be able to offer our veterans. Without doubt, the demographics of our veteran population are changing and our medical facilities and treatment methods must be ready to face that change.

According to Veterans' Administration figures, there are over 3.3 million veterans age 65 or older. By 1990 this figure is expected to rise to 7.7 million and to reach 9 million by the year 2000. Our construction program must realize the consequences of that increase in elderly veterans and plan accordingly to meet their needs. I look forward to hearing from our witnesses as to the capability of present construction plans to do that.

In addition, many states, such as Maine, have scattered, rural populations which may not be best served by a simple expansion of existing in-patient treatment facilities. I am interested in exploring the possibilities for diagnostic health-care clinics to assist the Veterans' Administration in providing health-care to veterans in such rural areas.

Last year, and again this year, I introduced legislation to instruct the Administrator of the VA to establish such a diagnositc health-care clinic on an experimental basis in Northern Maine. So it should come as no surprise that I am most anxious to hear from our expert witnesses the implications of the present construction prospectuses and planning processes on future expansion of out-patient facilities by the Veterans' Administration.

II

Calendar No. 196

98TH CONGRESS
1ST SESSION

S. 636

[Report No. 98–130]

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 1 (legislative day, FEBRUARY 23), 1983

Mr. HART (for himself, Mr. CRANSTON, Mr. SIMPSON, Mr. DECONCINI, Mr. RANDOLPH, Mr. MATSUNAGA, Mr. MITCHELL, Mr. COHEN, Mr. RIEGLE, Mr. HOLLINGS, Mr. SASSER, Mr. EXON, Mr. SARBANES, Mr. SPECTER, Mr. KENNEDY, Mr. LEAHY, Mr. LEVIN, Mr. DENTON, Mr. KASTEN, Mr. MURKOWSKI, Mr. BIDEN, Mr. CHILES, Mr. ANDREWS, Mr. BURDICK, Mr. PERCY, Mr. JOHNSTON, Mr. STAFFORD, Mr. FORD, and Mr. PRYOR) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

MAY 18 (legislative day, MAY 16), 1983

Reported by Mr. SIMPSON, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended by striking out in the item relating to chapter 51 "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended by striking out in the item relating to subchapter I "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"SUBCHAPTER I—CLAIMS".

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.".

SEC. 103. Section 4001 is amended—

(1) by amending the second sentence of subsection (a)—

(A) by striking out "(not more than fifty)" and inserting in lieu thereof "(not more than sixty-five)";

(B) by striking out "associate"; and

(C) by inserting before the period at the end of such sentence "in a timely manner"; and

(2) by adding at the end thereof the following new ~~subsection~~ *subsections*:

"(c)(1) When there are sixty-five members of the Board, the Chairman may from time to time appoint from the professional staff of the Board, or reappoint one time within the three-year period following the expiration of the term of the initial appointment, individuals to serve as temporary members of the Board for terms not to exceed one year. Not more than one such member may be appointed to a section of the Board.

"(2) If, as a result of the temporary absence of a member, a section is composed of less than three members, the Chairman may assign an individual from the professional staff of the Board to serve as an acting member of the Board on such section for not to exceed thirty days. An individual so appointed my serve a total of sixty days as an acting member during any fiscal year. Not more than one such member may be assigned to a section of the Board.

"(3) In each annual report to the Congress required by section 214 of this title, the Administrator shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which such report is made with respect to the authority provided by paragraph (1) of this subsection. In each such annual report, the Administrator shall indicate, in terms of full-time employee equivalents, the number of Board members appointed pursuant to paragraph (2) of this subsection.".

"~~(c)~~ *(d)* The Chairman of the Board shall submit a report to the appropriate committees of the Congress, not later than ~~October 1, 1983~~ *December 31, 1984*, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.".

SEC. 104. Section 4002 is amended by striking out "associate" wherever it appears.

SEC. 105. Section 4003 is amended—

(1) in subsection (a), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

~~(2) in subsection (b), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned".~~

(2) in subsection (b)—

(A) by striking out "When" and inserting in lieu thereof "(1) Except as provided in paragraph (2), when";

(B) by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

(C) by adding at the end thereof the following new paragraph:

"(2) When, without the vote of a member appointed under section 4001(c) (1) or (2) of this title a section would be evenly divided, such member shall not vote.".

SEC. 106. Section 4004 is amended—

(1) in subsection (a)—

(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is secured, shall, and

"(B) for good cause shown, may

authorize the reopening of a claim and a review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

(3) by amending subsection (d) to read as follows:

"(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of ~~fact, law, and~~ *fact and law and on* matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

SEC. 107. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 108. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.".

SEC. 109. (a) Chapter 71 is further amended by adding at the end thereof the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(A) ~~at a reasonable time prior thereto as well as during such proceeding,~~ to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the

Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights.".

SEC. 110. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 107 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator is authorized to conduct a study, commencing not more than one year after the date of the enactment of this Act, for a period of twenty-four months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005A(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

(2) In not more than three other geographic areas, the Administrator is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

(c) Not later than six months after the completion of such study, the Administrator shall report to the Congress on the results thereof, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

Sec. 111. Section 3010(i) is amended—

(1) by inserting "(1)" after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits

under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.".

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 222. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, *other than rules or regulations pertaining to agency management or personnel or to public property or contracts,* shall be subject to the requirements of section 553 of title 5.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 221 the following new item:

"222. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

SEC. 302. (a) Chapter 71 is further amended—

(1) by inserting after the table of sections the following new heading:

"SUBCHAPTER I—GENERAL"; and

(2) by adding at the end thereof the following new subchapter:

"SUBCHAPTER II—JUDICIAL REVIEW

"§ 4025. Right of review; commencement of action

"(a) For the purposes of this chapter—

"(1) 'final decision of the Administrator' means—

"(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

"(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

"(2) 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

"(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within one hundred eighty days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(d) ~~The Administrator shall file, together with~~ *Not later than thirty days after filing* the answer to a complaint filed pursuant to subsection (a) of this section, *the Administrator shall file* a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

"(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with such section or section 4027 of this title.

~~"(f) No action may be brought under this section—~~

~~"(1) where the initial claim for benefits is filed pursuant to section 3001 of this title after the last day of the fifth fiscal year beginning after the effective date of this section; or~~

~~"(2) with respect to matters arising under chapters 19 and 37 of this title.~~

"(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than one hundred and eighty days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to sec-

tion 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within one hundred and eighty days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.".

"§ 4026. Scope of review

"(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall—

"(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(B) compel action of the Administrator unlawfully withheld;

"(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

"(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(ii) contrary to constitutional right, power, privilege, or immunity;

"(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(iv) without observance of procedure required by law; and

"(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

"(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

"(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action.

"(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

"(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

"(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

"(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 109(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"Sec.
"4025. Right of review; commencement of action.
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof "except as provided in subchapter II of chapter 71 of title 38".

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Administrator shall approve reasonable attorneys' fees to be paid by the ~~claimant,~~ *claimant* to attorneys ~~recognized under this section,~~ for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

"(2) for any claim resolved after such time, an amount in excess of—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 ~~per centum~~ *percent* of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 ~~per centum~~ *percent* of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of this section—

"(1) the terms 'final decision of the Administrator' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025 (a) of this title; and

"(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs ~~where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just~~ *in accordance with the provisions of section 2412(d) of title 28, notwithstanding the provisions of section 204(c) of the Equal Access to Justice Act, Public Law 96–481.".*

SEC. 402. Section 3405 is amended—

(1) by striking out "or" after "title,"; and

(2) by striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—EFFECTIVE DATES

SEC. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than one hundred and eighty days after the date of enactment of this Act.

SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of the Veterans' Appeals rendered on or after April 1, 1983.

[From the Congressional Record, Vol. 129, No. 23, pp. S1894-S1898--Senate, March 1, 1983]

JUDICIAL REVIEW BILL

● Mr. HART. Mr. President, today Senator CRANSTON and Senator SIMPSON, the chairman of the Senate Veterans Affairs Committee join me in introducing S. 636, the Veterans Administration Administrative Procedure and Judicial Review Act of 1983. The purpose of S. 636 is to provide veterans and other claimants before the Veterans' Administration (VA) the right to judicial review of final decisions of the Administrator of Veterans' Affairs denying claims for benefits, to codify certain VA benefit claim procedures, to require that the VA comply with public notice and comment provisions of the Administrative Procedure Act in its rulemaking, and to permit veterans to pay reasonable attorneys fees.

Mr. President, the Veterans' Administration—the second largest client agency in the Federal Government—is one of the few agencies whose benefit decisions are not subject to the scrutiny of the Federal courts. Too often in the past, this exclusion, together with an outdated $10 limitation on attorneys fees, has resulted in an abridgement of fundamental constitutional rights of the veteran in hearings before the VA.

Mr. President, a veteran seeking VA benefits must file a claim with the VA regional office's rating board to determine eligibility for disability, pension, or other benefits. If the local rating board renders an unfavorable decision, the veteran can appeal to the Board of Veterans Appeals (BVA) in Washington, D.C. which is also part of the VA. Under existing law, the decision of the BVA on, "any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors, shall be final and conclusive, and no other official or any court of the United States shall have power or jurisdiction to review any such decision" (38 U.S.C. 211(a)). Unlike claimants before other Federal agencies, a veteran who feels that the BVA has misinterpreted the law or decided a case without taking all relevant facts into account has not recourse outside the Veterans Administration.

For more than two decades, the Social Security Administration—which also adjudicates disability claims—has been subject to judicial review of its final benefit decisions (42 U.S.C. 405(g)).

Mr. President, to insulate any agency from the scrutiny of the courts runs counter to some of our most cherished constitutional principles. In human terms, this denial of the due process rights of veterans has too often resulted in hardship and disillusionment for those who have defended our country and are most deserving of the guarantees of our constitutional form of government.

Mr. President, I first introduced legislation to open the Veterans' Administration to outside court review in May of 1976. Since that time my colleagues in the Senate have joined me in successfully passing, on two occasions in the 96th and 97th Congresses, legislation similar to that which we are introducing today. Both Senator CRANSTON and Senator SIMPSON have supported this legislation through their leadership as chairmen of the Senate Veterans' Affairs Committee. I am grateful for their help and guidance in helping to bring this legislation to the floor for its successful consideration in the last Congress as S. 349.

Mr. President, the central issue in the debate on this bill is whether we are going to afford the American veteran the same constitutional rights we grant other citizens in this country. Judicial review is important in granting the veteran adequate protection of his or her rights as a citizen, and it will provide improved oversight of VA procedures and activities by an independent outside body. American veterans have been denied for too long their fundamental right to simple justice in the adjudication of Veterans' Administration claims. Under current VA procedures, veterans have no right to appeal outside the agency, are effectively denied access to an attorney, and cannot question in Federal court the validity of the VA rules and regulations promulgated by the agency. S. 636, will correct these deficiencies and finally restore the full constitutional rights of the American veteran.●

Mr. CRANSTON. Mr. President, I am pleased to join with my good friends, the Senator from Colorado (Mr. HART) and the chairman of the Veterans' Affairs Committee (Mr. SIMPSON), in introducing S. 636, the proposed Veterans' Administration Adjudication Procedure and Judicial Review Act. I am delighted to note that we are joined by 34 original cosponsors, including the Senator from Arizona (Mr. DECONCINI), a member of the Veterans' Affairs Committee who was an original cosponsor of the predecessor to this measure in the last Congress, and 7 other members of the Veterans' Affairs Committee. Four of the cosponsors, Senators SIMPSON, DECONCINI, SPECTER, and DENTON, are members of both the Judiciary and Veterans' Affairs Committees and three others are members of the Judiciary Committee—the ranking minority member of that committee, (Mr. BIDEN), and Senators KENNEDY and LEAHY. The broad, bipartisan support demonstrated by this array of cosponsors is a strong indication of the merits of this legislation.

Mr. President, legislation to provide for judicial review of decisions of the Veterans' Administration on claims for benefits has been through an extended period of development in the Senate—beginning in the 94th Congress when the Senator from Colorado (Mr. HART) first introduced such legislation. During this period, the Committee on Veterans' Affairs has held eight hearings on judicial review legislation, and the Judiciary Committee has held one such hearing. Judicial review legislation has been before both the Veterans' Affairs Committee and the Judiciary Committee, with the Veterans' Affairs Committee twice voting to report such legislation, and the Judiciary Committee twice, after referral of the reported bill for a period of time, taking no action to amend the reported measures before being discharged from further consideration. The measures reported by the Veterans' Affairs Committees—S. 330 in the 96th Congress and S. 349 in the last Congress—were passed by the Senate without dissent. Unfortunately, the House Veterans' Affairs Committee, to which the measures were referred in the other body, took no action during either Congress. Nevertheless, I continue to hope that, should the Senate again pass judicial review legislation, the Committee on Veterans' Affairs in the other body might take some action on the issue which could then serve as a basis for the development of a consensual approach on this important issue.

Mr. President, the measure we are introducing today is identical to S. 349 as reported by the Veterans' Affairs Committee on June 3, 1982, and passed by the Senate on September 14, 1982, in all respects except one—the absence of title V from S. 349 which dealt with the status of members of the Board of Veterans' Appeals under the Civil Service Reform Act, an issue that has been resolved administratively. The basic purpose of this measure is to insure that veterans and other claimants before the VA receive all benefits to which they are entitled under law by providing them with the opportunity for judicial review of final decisions of the Administrator of Veterans' Affairs denying claims for benefits, by codifying certain internal procedures of the VA relating to the adjudication of benefit claims, by requiring that VA rulemaking processes comply with provisions of the Administrative Procedure Act relating to notice and comment, and by allowing claimant to pay attorneys reasonable fees for representation before the VA after a decision by the Board of Veterans' Appeals and for representation in judicial proceedings. My September 14, 1982, floor statement upon Senate passage of S. 349 discusses the bill's provisions in detail—S11421 of the daily edition.

Mr. President, there are a number of strong reasons supporting the enactment of judicial review legislation, and I would like to highlight some of them briefly at this time.

One of the important reasons judicial review is needed is to help insure fairness to individual claimants before the VA. In saying this, I do not mean to indicate a belief that the Board of Veterans' Appeals—the final adjudicative body within the VA—in any way intends to deny such fairness or that, despite the Board's best efforts, there is a routine denial of fairness. To the contrary, I believe that the members of the Board are fairminded, conscientious individuals who make a concerted effort to carry out their responsibilities in an evenhanded fashion and that, by and large, most claimants before the VA are treated fairly. However, I do know that the present system, which results in final, unappealable decisions by the Board, together with the statutory limit of $10 on the amount a claimant before the VA can pay an attorney for representation, leaves many disappointed claimants believing that they have been denied a full and fair opportunity to pursue their claims and that, as veterans, they are denied important rights that citizens have in dealing with virtually all other Federal agencies.

In addition to this perception of a denial of justice, Mr. President, is the very real chance that actual injustices do occur under the current system, a problem that opportunity for judicial review would substantially ameliorate. Although I know that the VA claims adjudication system is set up to be supportive of the veteran—as it should be—the VA is a very large and complex Federal agency, and unfair results are bound to occur. I have long been concerned that the tremendous volume of claims handled by the Board of Veterans' Appeals provides a significant opportunity for some injustices to occur. On the basis of current trends, the number of claims handled by the Board will continue to increase, thereby increasing the possibility of unintended unfair results.

Mr. President, another principal reason for judicial review legislation is the need to establish a basis for the review of questionable agency actions restricting, withholding, or withdrawing VA benefits—actions that can be expected to increase in frequency as there is greater pressure within the executive branch to realize cost savings in current programs. There have been numerous examples of such actions in the recent past—such as efforts by the VA to collect for the cost of health care provided to veterans who happen to be VA employees; attempts by the agency, at the direction of the Office of Management and Budget, to restrict beneficiary travel reimbursement for eligible veterans; allegations that some VA stations are applying very stringent standards in cases in which Vietnam veterans are seeking to be granted service connection for post-traumatic stress disorder; and the VA's drawing overly restrictive regulations to implement the targeted GI bill delimiting-date extension enacted in Public Law 97-72 as well as the radiation-exposure health-care eligibility enacted in that same Public Law.

In each of these cases and in other similar cases, the lack of access to court review has serious implications. Although the Committees on Veterans' Affairs in both Houses do their utmost to oversee the activities of the VA, the limited resources of the committee do not allow for thorough review of and congressional action to resolve satisfactorily all of the issues arising in such a large and complex agency. In addition, I do not believe that aggrieved veterans should have to be dependent for relief on congressional committee processes which, for all their virtues, cannot be fairly said to be designed to achieve or to be capable of achieving systematically the evenhanded dispensation of justice. Also, although the results of committee oversight are often salutary in terms of bringing about—either through legislation or administrative action under pressure, as was the case in the latter two examples I just cited—reversals of agency action, there is usually a long delay in having the correction made; whereas injunctive relief for irreparable injury can be a very speedy remedy.

If the veterans affected by various VA actions had access to court to challenge those actions, the individuals most directly affected by these actions would be guaranteed the opportunity to be heard by an entity outside of the VA and obtain urgent and timely relief in certain cases. In a similar way, the VA's handling of claims based on exposure to agent orange or to radiation from the detonation of a nuclear weapon would benefit from outside review by allowing those who believe they have been harmed to have their claims tested in an independent forum.

Mr. President, in making this point, I do not want to be understood as suggesting that the VA is wrong on all or any of these issues. Rather, I am suggesting that outside review by the independent branch of Government established in our constitutional framework with the special responsibility of determining whether governmental action is legal and whether it is fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny and, to the extent the agency's actions were upheld, would be vindicated. Likewise, to the extent the agency's actions were held unlawful or fundamentally unfair, steps could be taken to improve the process so as to insure that the agency is fulfilling its mission to serve veterans in the best possible fashion. I am concerned that agency action that does not have the benefit of outside scrutiny may fail to address fully the legitimate needs of those the agency exists to serve, and I believe that providing for judicial review would basically correct this shortcoming.

Mr. President, another important reason in support of judicial review is related to the status of the Board of Veterans' Appeals. Fundamental principles of due process, as guaranteed by the Constitution, require an independent review of administrative action affecting individuals' liberty or property interests. Although there are earlier court decisions suggesting that veterans' benefits are gratuities and not worthy of general due process protections, such a viewpoint is no longer valid, either philosophically—veterans benefits are earned by service in the military—or legally in light of a number of decisions rendered by the Supreme Court in the last decade holding that various statutory governmental benefits are legal entitlements and, thus, protected property interests of the beneficiary.

Mr. President, I do not believe that review by the Board provides the required independent action required by due process. Although the Board is not directly under the control of the Administrator of Veterans' Affairs, it is far too bound up with the agency, in many informal ways, to be truly independent and, more importantly, its independence is restricted by law. Under section 4004(c) of title 38, the Board is "bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer." Although I have high regard for the integrity of both the Administrator and the General Counsel, this does not alter the fact that allowing them—and future incumbents in those offices—to restrict the decisionmaking authority of the Board significantly restricts that body's independence.

A final purpose of judicial review legislation is to help clarify the state of the law on the scope of the current law provision that bars judicial review, section 211(a) of title 38. At present, there are some important differences between the various U.S. Courts of Appeals regarding the sweep of this prohibition, and I am concerned that the VA contributes to this confusion by raising the 211(a) bar in cases in which it is not appropriate. Thus, the circuit where a veteran seeks to bring an action may well determine the outcome of the case a result that should be avoided

Some courts have held, correctly I believe, that the 211(a) bar applies only to claims for benefits by individual veterans, while other courts have let the bar preclude suits involving other than individual benefit decisions. The most appropriate way to clarify the situation, in my view, is to enact legislation such as we are introducing today that provides specified, limited access to court for veterans and others with claims before the VA.

Mr. President, when S. 349 was before the Senate in the last Congress, the Congressional Budget Office estimated that its first-year cost would be $4.2 million and the cost of the first 5 years would be $51.9 million. Although that estimate has not yet been updated, I see no reason for any change except to the extent necessary to reflect the effects of inflation. This would be, I believe, a very modest cost to pay to insure that veterans, their survivors, and other claimants before the VA are given a full and fair opportunity to have their claims for statutory benefits reviewed and evaluated.

Mr. President, I look forward to working with Chairman Simpson, Senator Hart, the other cosponsors of this measure, and all my colleagues on this important legislation in the months ahead.

Mr. SIMPSON. Mr. President, I am pleased to join with my distinguished colleagues, the Senator from Colorado (Mr. Hart) and the ranking minority member of the Senate Veterans' Affairs Committee (Mr. Cranston) as an original cosponsor of the Veterans' Administration Adjudication Procedure and Judicial Review Act. The bill we are introducing today is substantially identical to S. 349, which was unanimously reported out of the Senate Veterans' Affairs Committee on April 28, 1982, and passed the Senate by a voice vote on September 14, 1982.

This legislation is designed to improve the adjudicate rights of individuals pursuing claims for Veterans' Administration benefits in order to make them more nearly comparable to the rights of claimants for other Federal benefits. We owe it to the veterans of this country, to their survivors and their dependents, to attempt to insure that the process of pursuing a claim for benefits based on service in the defense of this country is not more perilous or difficult than the process of claiming other entitlement benefits for which honorable service in the Armed Forces is not a prerequisite.

The improvements made by this bill would take the following forms: Most importantly, the bill would lift the present near-total prevention of judicial review of VA claims, in order to permit—for the first time—persons whose claims for benefits are denied at the agency level to appeal that denial in the Federal courts. It would codify certain adjudication procedures which are presently in use in the VA and which are generally favorable to claimants. It would authorize the VA to test two alternative methods of improving the appeals process within the VA. It would subject the VA to the formal rulemaking requirements of the Administrative Procedure Act. And it would lift the present $10 limitation on the amount of fees that may be paid by a claimant for an attorney representation in connection with a claim for VA benefits, in order to permit the payment of reasonable fees, not only at the Federal court level, but also in the final stage of the agency adjudication.

Mr. President, the need for this legislation is clear. Under present law as set forth in section 211(a) of title 38 of the United States Code, all VA benefits decisions are final and not subject to judicial review. Although, as discussed more fully in the Veterans Affairs Committee report, Federal courts have held that section 211(a) does not preclude judicial review of constitutional questions, certain procedural matters, and challenges to the Administrator's authority to issue particular regulations, the vast majority of VA benefits determinations remain unappealable to any court. Present law also provides, as set forth in section 3404(c)(2), that no attorney representing a claimant for VA benefits may be paid more than $10 for that representation—a provision which effectively precludes all but "pro bono" representation. Both of those limitations are at odds with the adjudicative rights afforded, primarily by virtue of the Administrative Procedure Act, to claimants for other Federal benefits.

In most other respects, however, the VA claims adjudication process has grown to serve VA claimants quite well. It contains a number of unique and valuable features which are worth preserving: Most notably, the use of informal rules for the admission of evidence, the practice of giving the claimant the benefit of the doubt on disputed factual matters, reliance on free representation before the VA by skilled representatives of the national veterans' organizations, and the impressive and well-established expertise of the Board of Veterans' Appeals in deciding the specific military and medical-related factual issues that arise in the context of claims for VA benefits.

Our task, then, in formulating this legislation was to preserve these positive aspects of the present system, and to enhance them through the addition of other important adjudicative rights and safeguards. Our purpose was to insure that veterans and other claimants before the VA receive all benefits to which they are entitled. We trust that the expansion of these important and almost universal rights of judicial review and meaningful attorney representation will appreciably further that goal.

Mr. President, the VA claims adjudication system is a living anachronism. Both the preclusion of judicial review and the limitation on attorney's fees are at least half a century out of touch and are based on obsolete assumptions and considerations. The preclusion of judicial review, first enacted in 1933, reflected the view that veterans' benefits are "mere gratuities" and that veterans have no right to such benefits so compelling as to warrant the protection of judicial review. Clearly, this position is no longer tenable, since the 1970 Supreme Court case of Goldberg against Kelly.

The reasoning behind the $10 attorneys' fee limitation is similarly obsolete. The $10 level was set in 1924, and was grounded in a desire to protect unfortunate pensioners from unethical lawyers fabricating claims and harassing veterans. It is clear that such a view of today's organized bar, particularly in light of the widespread network of State and local bar associations that now generally monitor attorney behavior, is not defensible.

Mr. President, this system, based upon such outmoded assumptions, is no longer appropriate for the veterans of this country. We must bring it up to date. I urge all of my colleagues to join me, the Senator from Colorado, the Senator from California, and the bill's 24 cosponsors, in supporting this important legislation.

[No. 29]

COMMITTEE ON VETERANS' AFFAIRS, U.S. SENATE

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General   Washington, D.C. 20530

MAY 20 1983

Honorable Alan K. Simpson
Chairman
Committee on Veterans Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The following comments pertain to S.636, a bill to amend Title 38 of the United States Code to establish procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration. This legislation will represent a departure from existing practice with concomitant substantial costs to the Government. The Department opposes enactment of this legislation. As you may be aware, the Department of Justice has previously provided in-depth comments on S.349, which the Senate passed in the 97th Congress.

The Department opposes the enactment of this legislation on the grounds that it will significantly increase litigation without producing any discernable benefits for veterans. Claimants for veterans' benefits currently have an elaborate administrative review structure which is suited to the specialized nature of these cases. Furthermore, judicial review of any constitutional questions presented in these cases is not now precluded. Placing these cases into the courts will only further complicate and lengthen the process of adjudicating these claims. And it will greatly increase the caseload in the U.S. Attorneys' Offices and in the courts. This increase is a natural result of a bill which provides access to the courts in a large class of claims not previously subject to judicial review.

In 1978 hearings on a predecessor bill to S.636, the Department of Justice estimated that twenty-one attorneys and twenty-four clerical positions would be required to handle the estimated 4,600 cases that would arise annually under the bill. S. Rep. No. 96-178, 96th Cong., 1st Sess. 131. The cost of this expansion was projected to be $885,000 for personnel and $535,000 for support costs, totalling $1,420,000. Of course, costs have greatly increased since these estimates were made; moreover, recent estimates suggest that the total number of cases filed under the bill may greatly exceed the 4,600 case estimate on which the projection is based.

The Department of Justice has experienced significant caseload problems since the adoption of a similar provision for judicial review of social security benefits determinations. For example, in fiscal year 1982, 12,045 social security benefits cases were filed. These cases, combined with those filed in prior years, resulted in a pending caseload of approximately 25,000 cases. These cases account for almost 50% of the cases pending against the Federal Government. We would expect to encounter a similar expansion of our caseload were S.636 to be enacted.

The difficulties faced by the federal courts in handling their growing caseload have attained crisis proportions. We can only alleviate this problem if we begin to consider alternatives to placing cases in the federal courts, including administrative systems such as exist here.

If the Committee chooses to approve S.636, we have the following suggestions which we would hope the Committee would consider.

We are concerned with the scope of review for factual determinations made by the Administrator in Board of Veterans Appeals proceedings. We previously expressed concern that extensive review of such factual determinations would greatly exacerbate the significant caseload problems which will naturally result from judicial review of a new class of claims. In S.636, as in S.349, these concerns were addressed by allowing a court to overturn the Administrator's factual findings only where a finding "is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding was not set aside". 38 U.S.C. § 4026 (proposed language). While this language is a good first step in limiting the scope of judicial review of factual determinations, we feel that it might still permit extensive review of factual determinations. The proposed language provides a new standard which likely will require extensive judicial construction prior to application. A court will be required to determine what degree of evidence constitutes a "rational basis" for a finding, how far removed from a "rational basis" a finding may be before it is deemed to cause "a manifest and grievous injustice", and what degree of hardship must be present before a finding causes "a manifest and grievous injustice". If a court construes these terms broadly, it is possible that the standard of review could, in effect, approximate an "arbitrary and capricious" or even "substantial evidence" standard. The standard offers little guarantee against a recurrence of the enormous problems attendant to the factual review in Social Security cases which we discussed in our comments to the Committee on Veterans Affairs.

The best approach to this problem is to provide review only of the legal basis for the Administrator's decision while reposing sole responsibility for factual determinations with the

Boards of Veterans Appeals, which have the expertise necessary to weigh and interpret properly complex medical evidence. Experience dictates that many litigants advance any available arguments, even if the chances of success of the arguments are restricted. Therefore, a mere tightening of the standard of factual review is likely to reduce only the number of cases that successfully raise factual challenges, not the absolute number of factual challenges. A preclusion of factual review will protect the integrity of the Administrator's factual findings and assure control over the caseload resulting from S.636. However, should the Committee wish to retain some degree of factual review, we suggest that section 4026 be amended to provide in pertinent part:

> (a) In any action brought under section 4025 of this title, the reviewing court, to the extent necessary to its decision and when presented, shall --
>
> * * *
>
> (4) in the case of a finding of material fact made in reaching a decision for a claim for benefits under laws administered by the Veterans Administration, hold unlawful and set aside such finding where there is no evidence in the record to support it.

This standard should decrease the likelihood of a judicial expansion of factual review.

Lastly, we have reservations about section 401 of S.636 which provides for an award of attorneys' fees from the Administrators "where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just". The Equal Access to Justice Act provides the appropriate model to follow in setting the standards for the award of attorneys' fees. Indeed, in adopting language similar to that found in S.636 in the last Congress, the Committee indicated that it intended to provide an attorneys' fee standard similar to that contained in the Equal Access to Justice Act, P.L. 96-481, S. Rep. 97-466, 97 Congress, 2nd Session 79 (1982).

And yet section 401's language appears to provide an attorneys' fees standard that is broader than the standard set forth in the Equal Access to Justice Act. The difference in standards is found in two cases. First, unlike the standard contained in the Equal Access to Justice Act, which permits the denial of an attorney's fee award where "special circumstances make an award unjust" (28 U.S.C. § 2412 (d)(1)(A), the standard contained in S. 636 would arguably limit a court's power to deny the award of attorneys' fees where special circumstances make an award of attorneys' fees unjust to situations where the court also finds that the position of the Administrator is justified. Even where the position of the Administrator is unjustified, however, the court may feel that the conduct of the prevailing party in the course of litigation, such as abusing discovery procedures, unduly prolonging litigation to generate increased attorneys' fees, or generally acting in bad faith, justifies the denial of an attorneys' fees award.

Second, the standard in S. 636 would permit a court to award attorneys' fees, even if the position of the Administrator is substantially justified, where special circumstances make an award just. However, the Equal Access to Justice Act precludes an award in any case where "the court finds that the position of the United States was substantially justified". 28 U.S.C. § 2412(d)(1)(A). Thus, S.636 once again goes further than the Equal Access to Justice Act in exposing the United States to liability for attorneys' fees.

To insure that S.636 more closely follows the Equal Access to Justice Act in providing for the award of attorneys' fees, we suggest that the language of Section 401 be amended to provide:

> (h) In an action brought under section 4025 of this title, the court may award to a prevailing party other than the Administrator, reasonable attorneys' fees and costs where the court finds that the position of the Administrator was not substantially justified and special circumstances do not make an award unjust.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

[No. 32]

COMMITTEE ON VETERANS' AFFAIRS, U.S. SENATE

Office of the
Administrator
of Veterans Affairs

Washington, D.C. 20420

Veterans
Administration

June 1, 1983

Honorable Alan K. Simpson
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your request for a report on S. 636, 98th Congress, as introduced. This measure, entitled the "Veterans Administration Adjudication Procedure and Judicial Review Act," is similar to S. 349, 97th Congress, passed by the Senate on September 14, 1982.

For reasons set out below, we oppose enactment of the bill.

The bill contains four titles which contemplate numerous changes in present law concerning claims for benefits administered by the Veterans Administration (VA). First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefits decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants dissatisfied with VA benefit decisions. Finally, the legislation would substantially revise the current $10 statutory limitation on the fee an attorney may receive for representing an individual claimant seeking veteran benefits.

The provision of the bill of overriding significance to this Agency and to veterans is title III, which provides for judicial review of individual VA benefit determinations. The remaining titles largely seek to facilitate implementation of this change. We believe the proposed judicial review of individual VA benefits decisions is inadvisable and unjustified, and we therefore oppose adoption of this measure in its entirety.

We share with the Congress, and particularly this Committee, the goal of providing for veterans and their families a fair and compassionate adjudication system. We simply believe, both philosophically and as a practical matter, that such a system does not have to include Federal court intervention to achieve that goal.

We are cognizant of the recent history of judicial review legislation dating back to the 95th Congress and the similarity of this bill to legislative proposals commented on at length by this Agency in the past. Because of the many technical issues raised by S. 636, we summarize our primary comments in this letter and enclose a section-by-section analysis with specific comments and an appendix elaborating on the points we regard as particularly important.

The principal issue raised by this measure is whether judicial review of individual VA benefit decisions is warranted. We are convinced that our present adjudication procedures provide a fair and efficient means of resolving veterans benefit claims and are preferable to a system involving judicial readjudication of individual benefit decisions. It is our considered opinion that the informal, nonadversary nature of our claim procedures, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to grant a claimant the benefit of the doubt, not only meet the requirements of due process, but provide greater protection to claimants than is available in comparable proceedings at other agencies. (Section I, Appendix). Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective and practical method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts. (Section II, Appendix).

We think that the most significant defect in the bill is the proposed judicial review of factual determinations made by the BVA in individual benefit decisions. Judicial review of challenges as to the constitutionality of statutes governing veteran benefits already exists. Likewise, in several circuits judicial review of constitutional challenges to Agency regulations and procedures, allegations that the Agency exceeded statutory authority in the promulgation of regulations, and other challenges involving matters of general applicability has also occurred. We do not assert that section 211(a) insulates every VA action from the scrutiny of Federal courts. We do assert that section 211(a) should continue to preclude judicial readjudication of individual benefit decisions. (Section III, Appendix).

Another relevant factor that should be considered in assessing the need for judicial review of individual benefit decisions is that there is nothing to indicate that the current preclusion of judicial review results in injustice. To the contrary, as noted in the Committee's report on S. 349, 97th Congress, there is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits. S. Rep. No. 97-466, 97th Cong., 2d Sess. 24 (1982).

Likewise, the constitutionality of 38 U.S.C. § 211(a) has been consistently upheld by the courts, and we are unaware of any due process guarantee that mandates a right to judicial review. Rather, our research confirms the continued viability of the principle that Congress, when it creates rights in individuals against the Government, is under no obligation to provide a judicial remedy. It may instead provide only an administrative remedy. (Section IV, Appendix).

Accordingly, the issue is not one of constitutionality but of preference. The Social Security Administration's experience with judicial review of Social Security determinations as provided under the Social Security Act demonstrates that judicial involvement in administrative benefit determinations does not have a positive effect on the administration of the program. Given this background, the VA is unwilling to endorse any proposal which would create a system analogous to that involving the review of Social Security claims. (Section V, Appendix).

Although 38 U.S.C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes are relatively common throughout the Federal government, and continue to be enforced in a variety of situations. The Administrative Conference of the United States has identified some forty examples of statutes precluding or restricting judicial review of administrative action. Of course, many of these statutes address specific issues that are by no means analogous to those that arise in the VA, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or severely restricted in such important areas as: Federal employee disability compensation; selective service classification and processing; grant, denial, and revocation of parole; exclusion orders affecting arriving aliens; and determinations controlling coverage of states and localities under the Voting Rights Act. (Section IV, Appendix).

Contributing to the problems inherent in judicial review of VA benefit decisions is the difficulty in defining an appropriate standard of review. (Section VI, Appendix). The rational basis standard mandated in this bill is an untested concept which will have to be defined through litigation and may be subject to differing interpretations among various jurisdictions. The continued presence in the bill of an arbitrary and capricious standard for review of VA decisions may superimpose this nebulous concept as an alternative standard when Agency decisions involve mixed factual and legal issues such as sufficiency of the evidence relating to a factual matter. Although this Committee noted the difficulty in distinguishing such issues in its report on S. 349, supra at page 42, the scope of review provisions of the bill continue to require the courts to differentiate such issues in determining the appropriate standard of review to be applied. (Section VII, Appendix).

Further, we believe that judicial review of administrative determinations involving factual issues is particuarly inappropriate and unnecessary in the case of the VA, in view of the Agency's liberal policy of assisting claimants in establishing entitlement to all benefits for which they are eligible under law. Moreover, the importance of judicial review of administrative fact determinations is substantially reduced by the governing principle in VA proceedings that the benefit of the doubt is to be resolved in favor of the claimant. The recognized uncertainty surrounding the various standards of factual review, see K. Davis, Administrative Law of the Seventies § 29.00 (1976), and the tendency of the Federal judiciary to expand its jurisdiction through expansive reading of jurisdictional statutes leads us to conclude that judicial review of VA findings of fact is inadvisable. For all of these reasons, we believe that any attempt to provide judicial review of VA factual determinations regarding benefit claims would be subject to expansive interpretation by the courts and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans.

With regard to the remaining provisions of the bill, we note that many of the adjudicatory procedures included in title I merely restate existing agency practices, while others are clearly intended to complement the provisions concerning judicial review contained in title III. Some are administratively burdensome or expensive, without the prospect of worthwhile results from their implementation. One provision, to increase the size of the BVA to 65 members, is inadequate to accomplish its intended purpose of allowing timely appellate consideration and enhancing the Board's ability to handle the increased workload which would result from judicial review. In our view, this title is unnecessary in the absence of judicial review and we thus recommend against its adoption. A detailed description of our views on the specific provisions of title I is included in the enclosed section-by-section analysis.

We note that title II of the bill, requiring the VA to comply with the notice and comment provisions of 5 U.S.C. § 553 in Agency rulemaking, parallels the procedure already in use by the VA for benefits regulations. Therefore, the section is unnecessary to achieve this purpose. Further, the section is overbroad in its effect. A more detailed discussion of the section's potential impact is included in the section-by-section analysis.

Finally, we are not prepared to support the significant modifications to the present statutory attorney fee limitation, 38 U.S.C. § 3404, that would occur under title IV of this bill. A detailed description of our views on the specific provisions of title IV is included in the enclosed section-by-section analysis.

In summary, it is the VA's position that the present system of adjudication of claims for veteran benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claim adjudication have not been adequately justified. The remaining provisions of the bill are largely dependent on the adoption of judicial review of individual VA benefit decisions and are unnecessary in the absence of such review. For these reasons, we oppose passage of S. 636.

It is difficult to predict the number of dissatisfied VA claimants who may decide to appeal to the courts. Based upon the current workload, and using the Social Security system rate of appeals as a model, however, it may be anticipated that approximately 4100 veteran cases would be filed annually in Federal courts. We are unable to estimate either the costs of the increased caseload on the court system or the cost to the Department of Justice to litigate these cases.

It is estimated that the cost to the VA of enactment of S. 636 would be as follows:

FISCAL YEAR	COST (000's)
1984	$9,815.7
1985	9,566.1
1986	8,704.1
1987	8,766.1
1988	8,827.1

These costs do not include any payments of attorney fees that may be awarded pursuant to the authority of the new subsection (h) of 38 U.S.C. § 3404. We are unable to estimate the cost of this provision since these fees will depend upon the number and size of the claims allowed, and what each individual judge may consider a "reasonable" fee.

Honorable Alan K. Simpson

In addition, these costs do not include estimated benefit costs, which would be less than $1 million each year. A detailed explanation of the costs that would result from enactment of S. 636 is provided in Section VIII of the Appendix.

Advice has been received from the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Harry N. Walters

HARRY N. WALTERS
Administrator

Chairman SIMPSON. We will begin now with John Murphy. You might introduce your associates, and we appreciate having your testimony.

TESTIMONY OF JOHN P. MURPHY, GENERAL COUNSEL, VETERANS' ADMINISTRATION, ACCOMPANIED BY KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS' APPEALS; MAX R. WOODALL, DIRECTOR, COMPENSATION AND PENSION SERVICE; AND EDWARD J. LUKEY, DEPUTY ASSISTANT GENERAL COUNSEL

Mr. MURPHY. Thank you very much, Mr. Chairman. On my left is Mr. Max Woodall, the Director of the Compensation and Pension Service in the Department of Veterans' Benefits. On my immediate right is Mr. Kenneth Eaton, Chairman of the Board of Veterans' Appeals. On my far right is Mr. Ed Lukey, Deputy Assistant General Counsel in the Office of General Counsel for the Veterans' Administration.

With your permission I would like to briefly summarize the prepared statement, somewhat changing a little bit the text of the presentation.

Mr. Chairman, the bill contains four basic titles. The issues that we are directing ourselves to are primarily those in title III which provides for the judicial review of individual benefit decisions.

The remaining provisions we feel are intertwined with title III, and therefore that much of the debate and discussion on the bill surrounds appropriately title III.

I would also like to mention that we are in the process of preparing a detailed report for the committee and hope to have it up here in the near future.

The basic problem the Veterans' Administration has with the issue of judicial review of individual benefit decisions arises out of the process that we now have which we consider to be very favorable to the veteran. The procedures the Agency has for adjudication and appeal to the Board of Veterans' Appeals were designed and are, in fact, very proveteran and favorable to the veterans of our country. For example, the VA has an obligation to assist claimants in making their claims, in resolving their claims. We have a well known rule that we resolve benefits of doubt in favor of the veteran, and as a final example but not by any means an exclusive listing, the review by the Board of Veterans' Appeals is a de novo review.

In addition, because of the nature of the Agency's missions and obligations and the long period of time with which we have addressed these issues, the Agency has developed what is recognized as a very high degree of expertise in these areas dealing with veterans, our laws, the application of our laws, and the procedure. In fact, the bill largely codifies many of the existing procedures presently found in VA regulations. A number of statements I have heard from Congress, various Senators and Congressmen, as well as others, are laudatory and praiseworthy of the VA's existing system.

The VA's system, as I view it, has basically been challenged on three general levels. One of the levels is that the system as it presently exists provides an opportunity for injustice. I would note in this connection that, as I just mentioned, the system is generally considered to be praiseworthy and fairly good; also that we do not in our experience face the situation of a high degree of dissatisfaction, particularly well-based dissatisfaction with the decisions of the Agency.

Also, the statement is made that veterans are the only ones denied access to the Federal judiciary. In this connection I would like to make two points; first of all, that that is not a completely accurate statement. There are other statutory schemes which do not envision judicial jurisdiction, for example, the Federal Employees Compensation Act. A Federal employee cannot obtain judicial review of a claim for compensation. Some of the categorizations under the Selective Service are likewise not subject to judicial review.

One other point I would like to mention in this regard is in response to the comment that the absence of judicial review of veterans' benefit claims somehow makes veterans second-class citizens. I would like to point out that I think just the converse is true. The system the Veterans' Administration has, our informal, proveteran procedures as well as its rules and its applications, are in favor of the veterans.

I think that you could state with a high degree of certainty that our existing system makes veterans what they should be—first-class citizens.

Another allegation made is that the absence of judicial review of veterans' individual benefit claims denies these veterans due process. I would simply point out that it does not deny the veterans due process. The constitutional rule is that Congress fully has the authority to create a benefit system and to place it in an agency and that the absence, by congressional decision, of judicial review is not a denial of due process. That was so held in a case involving the Veterans' Administration, *DeRodulfa* v. *the United States.*

Given the situation of a good system, one that serves its purpose, serves it very well, we come at last to the question of is judicial review desirable? We have some experience with the social security system that gives us some help. I would just note quickly that one of the problems you get with a judicial review system is inconsistent precedent. There are 94 district courts in the United States. We are not at all sure that a consistent precedent will develop. In fact we are fairly sure that we will have an extended period of time in which veterans' entitlements will be construed differently in different areas so that instead of a national system of veterans' laws we may end up with a geographically based system, that we will have the dilution of Agency expertise and the substitution of the court's judgment for that of the Agency.

There are other issues that I could go into, but I will just close by pointing out what I think is an anomaly in the whole thing, which is that we are here talking about extending judicial review of administrative determinations while at the same time the Chief Justice of the United States, in his annual report on the state of the judiciary delivered to the American Bar Association midyear's meeting, is suggesting that we need to consider moving cases from the adversary system to the administrative process as a means of relieving the already awesome burden on the Federal judiciary.

Mr. Chairman, we would be glad to respond to any questions the committee may have.

Chairman SIMPSON. Thank you very much, Mr. Murphy. I appreciate your views as General Counsel for the VA.

We have a markup of this bill scheduled for April 12. To have time to consider the VA's detailed report on judicial review I would ask you if you would please furnish that as soon as possible for us; no later than a week from today would be most helpful, if you could do that.

Mr. MURPHY. I will certainly try and I think that we can.

Chairman SIMPSON. If not, if you can contact the staff, but that is very important for us. We want that.

This morning I introduced legislation recently proposed and submitted by the VA to increase the size of the BVA from 50 to 65 members. That change is also contained in the bill before us today. The administrator's letter transmitting that legislation refers to a backlog of 25,000 appeals and growing delay in rendering BVA decisions.

What is the current processing time for a case before the BVA, and I guess that is your area, Mr. Eaton. I would be interested in having the current figure on the reversal rate before the BVA, the number and percentage of appellants requesting personal hearings, and the number and percentage of claimants represented by attorneys.

Mr. EATON. First of all, sir, our backlog is such now that from the time the notice of disagreement is first filed until we reach a final decision, the average time is 16 months. The optimum time would be approximately 10 to 11 months which indicates that we are some 5 months slower than we should be, and the reason for that is that we have a large backlog of appeals.

I noticed you said something about the 20,000 area, and in my mind I am quite sure that we have something like 40,000 substantive appeals that are currently pending. Some of them are at the Board and some are awaiting callup from the regional office. We have over 40,000 waiting for us, and as I say it is a 16-month delay time before it is finished. It should be about 10 or 11 months. Of course, there are many good reasons for that, such as the number of appeals being filed.

Now as to this reversal rate, for the past 4, 5 years—I assume when you say reversal we are talking about where we reverse the regional office and we allow the case. For 4 or 5 years our allowance rate as we call it was approximately right around 12½ percent. In fiscal year 1982 it was 13 percent, and I might add for the first quarter of 1983 only our allowance rate was 14 percent. For the last year or 1½ years I can truly say we have been raising the allowance rate slightly.

Chairman SIMPSON. Personal hearings?

Mr. EATON. Personal hearings, yes; we have a very high allowance rate on Travel Board hearings. That lately has been something like a 35-percent allowance rate, and on personal hearings——

Chairman Simpson. You can furnish that for the record if you wish.

Mr. Eaton. I do have it—18.4 percent for other personal hearings, and then, of course, our average really is 13, is 14 percent recently.

Chairman Simpson. Those are represented by attorneys?

Mr. Eaton. By attorneys—I have that right here. For 1982, attorneys' allowance rate was 13.3 percent as opposed to 13 percent for the overall. I might add for service officers it was 13.2 percent.

Chairman Simpson. How much are represented by attorneys?

Mr. Eaton. In 1982 there were only 860 cases. These are in a category—attorney and/or agent we call it, but most of those are actually attorneys. That is not the service organizations, and that is out of the almost 36,000 appeals we had 860 cases represented by attorneys.

Chairman Simpson. You note that preclusions of judicial review are not uncommon in other areas of law and present law under the Federal Employees Compensation Act is analogous to this situation.

I don't know that that would seem so because the FECA covers one-time awards of compensation to Federal employees suffering work-related injury, but it is my understanding that no other Federal benefits and particularly no other entitlement benefit is subject to a preclusion of judicial review, and I would be interested to know whether your research has uncovered any such provision.

Mr. Murphy. Let me ask Mr. Lukey to answer that.

Mr. Lukey. Mr. Chairman, we have not located any system in our research that is treated quite the same way as the VA system on the question of judicial review.

However, what we will do in our report is detail for the committee the other statutory provisions in which review is precluded. I started to say, though, that no system is quite like the VA's, but the Federal employee compensation system would be most analogous.

Chairman Simpson. If you would, please. Then, just out of curiosity to me, when was the last time any attorney was prosecuted under section 3405 for charging more than $10 to a veteran or other claimant before the VA?

Mr. Murphy. As far as I know, no one has ever been prosecuted. We would have to research it. We are not aware of any.

Chairman Simpson. Has anyone been imprisoned at hard labor for any period up to the statutory 2-year maximum? You can share that with me if you might.

Mr. Lukey. Mr. Chairman, it may be of——

Chairman Simpson. Or has anyone ever been convicted under this section?

Mr. Lukey. It may be of interest to you that every now and then when a situation of an attorney charging a fee is discovered correspondence from the VA or a telephone call to the attorney usually straightens the matter out and the money is returned to the veteran.

Chairman Simpson. Is it returned? Does that happen?

Mr. Lukey. Generally so, and although our records may not be all that clear on the point, we may have made referrals to the Department of Justice in which there have been no prosecutions. However, I think the fairest thing to do is to respond for the record.

Chairman SIMPSON. Show me what would be your figures on that if you will.

[Subsequently, the Veterans' Administration submitted the following information:]

A number of examples of criminal prosecutions and convictions under predecessor statutes to 38 U.S.C. § 3405 are found in title 38 of United States Code Annotated, section 3405. The most recent such reported case of which we are aware is *Sanchez* v. *United States*, 134 F.2d 279 (1st Cir.), cert. denied, 319 U.S. 768 (1943), in which a conviction for soliciting and receiving an excessive fee from a veteran in an insurance claim matter was upheld.

Evidence of a violation by an attorney would be, by regulation, necessarily referred to the Department of Justice for consideration of prosecution. Referrals for prosecution in attorneys' fee would historically have been handled by direct contact between VA District Counsels or the Office of Inspector General and the various U.S. Attorney's offices. The VA has no centralized records of any such referrals.

In any event, members of my staff recall instances where, when the VA learned that an attorney had charged or attempted to charge an excessive fee in a veterans' claim matter, a VA official contacted the attorney in question by telephone or letter to explain the statutory fee limitations. Such contact has generally been sufficient to resolved the issue. We keep no statistics on the number of cases handled in this matter, although we are submitting for the record an example of correspondence on this subject.

We also note that section 3405 has been used as a basis for disciplinary proceedings against attorneys charging excessive fees to veterans. In *Matter of Morris*, 270 S.C. 308, 241 S.E. 2d 911, appeal dismissed, 439 U.S. 808 (1978), an attorney was disbarred for, among other offenses, charging a clearly excessive and illegal fee in representing a veteran in a claim for increased benefits. An attorney was suspended from the practice of law in *State ex rel. Oklahoma Bar Association* v. *Fore*, 562 P. 2d 511 (Okla. 1977), for neglect of a legal matter and collection of an illegal fee, *i.e.*, one in excess of that permitted under section 3405. Based on the above, we think that section 3405 is having its intended deterrent effect to prevent payment of all but the nominal attorney fee. You should also know that, by regulation, VA permits payment of direct expenses incurred by an attorney in representing a claimant for VA benefits. 38 CFR § 14.634(b).

024

Everett P. Anderson, Esq.
Pennington, Wilkinson & Sauls
Attorneys at Law
325 John Knox Road
Suite L-101
Tallahassee, Florida 32303

Dear Mr. Anderson:

This is in reference to your letters of January 13, 1977, and February 3, 1977, and our telephone conversation of February 17, 1977, regarding attorney fee limitations. More specifically, by your letter of January 13, 1977, you requested our opinion on the following question:

> ". . . do the VA laws and regulations permit me to charge a reasonable attorney's fee to the parents of a veteran whom I represent before the Veterans Administration, it being understood that no part of the fee would be paid out of any funds secured for the veteran from the VA?"

You noted that you have put many hours into preparation for the presentation of a claim for service connection for a chronic schizophrenic condition for the veteran in question.

As was indicated in our telephone conversation, it is the opinion of this agency that subsections 3404(c) and 3405 of title 38, U.S. Code, as well as the implementing regulations, 38 C.F.R. 14.631 and 14.635, preclude the receipt of fees, indirectly as well as directly, in excess of the $10 allowed by statute for the preparation and presentation of a claim for monetary benefits administered under the laws of the Veterans Administration.

Accordingly, it is our opinion that receipt of a fee in excess of this amount from the parents of the veteran in question for the monetary benefit claim work you have engaged in regarding that veteran would be in violation of subsection 3405, title 38, U.S. Code, and, the implementing regulation, 38 C.F.R. 14.631.

Sincerely yours,

JOHN B. DE LEO
Assistant General Counsel

By: ______________________
JOHN W. KLEIN
Deputy Assistant
General Counsel

Chairman SIMPSON. One final question, then perhaps some of the members have questions. You state your concern that Federal court review raises the prospect of inconsistent determinations—I think I have heard that in my Judiciary Committee activities in the corporate forum with the chairman here—in the Nation's many district court jurisdictions.

Without getting bogged down in the merits of that statement I would ask whether, or to what extent, such a statement might affect the VA's view of the concept of a court of veterans' appeals as proposed by the DAV and endorsed by the Administrative Office of the U.S. Courts and contained in legislation which is presently making its way around the House of Representatives?

Mr. MURPHY. We are not in a position where we can formally comment on legislation, quite frankly, Senator, because we have not gone through the executive branch process with that, nor have we specifically focused on it.

I would be very interested in seeing the legislation in the context of requesting agency views so that we could specifically perform an analysis. Personally, of course, it would be my view that that would tend to alleviate the problem of adjudication. Personally I would also state that that is not very much different than what we really have now.

Chairman SIMPSON. That is an interesting thought. We have it in patent law and tax law and so on and so on, trying to keep it all in one court or letting it go to the various jurisdictions. I have always been one more interested in diversity than sometimes sterility that comes from a court where the people practice and they have become so steeped in knowledge that it is very difficult to even get the human equation.

I find that sometimes by those who practice in front of specialized courts and judges who receive their testimony and the evidence in those courts. It is just a personal view.

Senator BOSCHWITZ. Mr. Chairman?

Chairman SIMPSON. Yes. Do you have some comment?

Senator BOSCHWITZ. I am very interested in your comment on sterility, but are you going over to vote?

Chairman SIMPSON. I am going over. We are not voting on sterility, are we?

Senator BOSCHWITZ. I don't believe so.

Chairman SIMPSON. I am waiting for our good colleague from California and hopefully—there he comes. Now be prepared. I am leaving and you're on your own. I'll be back.

Senator CRANSTON [presiding]. Yes. Mr. Murphy, it's a pleasure to have a fellow from California before the committee.

On page 3 of your statement you state that the review provided by the BVA, "* * * is independent, and the VA has scrupulously maintained this independence."

In the case in which the BVA member believes that a VA regulation is contrary to a provision of title 38 or otherwise unlawful, does that member have the independence to disregard the regulation and apply the law as he or she sees it?

Mr. MURPHY. The member would have the independence to ask the Office of General Counsel whether that was in fact the case and then we would make the legal determination.

Senator CRANSTON. But the member does not have the independence to make a decision as he or she sees it?

Mr. MURPHY. That is correct.

Senator CRANSTON. Section 4004(c) of title 38 provides that the BVA, quote, "* * * shall be bound in its decisions by instructions of the Administrator."

How do you construe that provision, and do you believe that it intrudes upon the—independence—of the Board?

Mr. MURPHY. Senator, the BVA—and Mr. Eaton can speak to this as well—the BVA has in fact, by evolution and certainly also in part by design, evolved as an independent body in the determination of claims.

I am not aware, and I will ask Mr. Eaton if he has any one in a second, of any case in which the Administrator has given instructions to the BVA regarding claimants. Ken?

Mr. EATON. Not on any individual case; it has never been done to my knowledge. The Administrator, if he were to issue an Administrator's decision, that would be more like a General Counsel's opinion, and that law then we are required to follow by law.

We do not receive any instructions from the Administrator or guidelines as to how to administer any factual determinations of any kind.

Mr. MURPHY. Senator, if I could add, in the Office of General Counsel we are aware that is a longstanding consideration, certainly one to which I fully adhere, that we view the BVA as essentially a court, and that all of the independence of a court in connection with commenting on or addressing the specific claims are not undertaken. It is the BVA's decision.

Senator CRANSTON. How can it be a court if it can't look behind the regulations to the law?

Mr. MURPHY. It is a court in the adjudication of the individual facts. The ability to look behind the regulations and to interpret the law resides in the Office of General Counsel. The Agency is not without that ability.

Senator Cranston. So the Board is merely a factfinder, not a court?

Mr. MURPHY. It is a factfinder.

Senator CRANSTON. Not a court technically. If the Board believes that a precedent opinion of yours or one of your predecessors interprets the law erroneously, does the Board have the independence to disregard that opinion or is it required to follow that opinion?

Mr. MURPHY. It does not have the independence to disregard that opinion. It certainly has the independence to ask that that opinion be reconsidered and, of course, such requests are granted and undertaken in great detail.

When the Chairman of the Board of Veterans' Appeals indicates questions regarding the propriety of a decision the decision will be totally reviewed with extreme care.

Senator CRANSTON. Mr. Eaton, would you give us for the record examples of the requests for reconsideration over the past 3 years?

Mr. EATON. In a General Counsel opinion? I can remember one specifically that I believe is sitting on Mr. Murphy's desk right now where I am of the opinion that General Counsel is taking the wrong track, and I received the General Counsel's opinion and have asked him to see if he can't take another good, hard look at it. That is the only one I can remember at the moment, but this particular one is a real problem for me, and I have asked him to look at it again.

Senator **Cranston**. How many have there been within your memory where there has been a reversal?

Mr. **Eaton**. I have been the Chairman for a year and a half, and that is——

Senator **Cranston**. How long have you been a Board member?

Mr. **Eaton**. Ten to twelve years.

Senator **Cranston**. Would you give us for the record—I would like to see a listing of how many requests for reconsideration there have been and how many reversals there have been.

Mr. **Eaton**. Yes, sir.

Senator **Cranston**. Over the last 10 years.

Mr. **Murphy**. I think we can both review our records and provide that for you, sir.

[Subsequently, the Veterans' Administration submitted the following information:]

A search of our files discloses that from 1973 to the present the Board of Veterans' Appeals has requested and received 60 opinions from the Office of General Counsel. At this time there are three requests pending General Counsel review. Although the Board has requested the Office of General Counsel to reconsider prior opinions, they have also periodically requested that agency regulations or Veterans' Administration procedures be reviewed. We have identified 10 opinions and 2 pending requests for opinions which have dealt with these types of issues. They are broken down and summarized as follows:

(a) Questions as to the legality of an Administration policy or procedure as defined in a circular, manual or other administrative issue.

UNPUB GC February 14, 1978—The Board requested clarification of Department of Veterans Benefits (DVB) position as it related to the applicable law and regulations, including certain Federal Aviation Administration regulations. The General Counsel (GC) concluded that the DVB policy concerned was consistent with the controlling statute providing educational benefits.

UNPUB GC July 6 1978—The Board requested a review of language in a VA computer generated letter as to whether such language was legally sufficient as a request for evidence to complete a claim for educational benefits? GC reevaluated an earlier opinion and determined it to be inapplicable due to regulation changes in the interim. They then recommended that DVB consider revising their computer paragraphs to more clearly indicate the nature of the evidence required in such cases.

UNPUB GC February 8, 1979—OP GC 18-79, April 10, 1979—The Board requested guidance concerning the basis for computation of the period for which educational assistance is awarded under title 38, United States Code. GC evaluated DVB policy versus proposed BVA method of calculation and concluded that since DVB method had been applied uniformly for years without Congressional alteration, to change to a new less restrictive basis of computation would be inappropriate.

UNPUB GC June 28, 1982—The Board requested that a procedure of the Department of Medicine and Surgery (DM&S) as contained in Interim Issue 10-77-28 and VA Manual M-1, Part I, "Operational-Medical Administrative Activities," Chapter 30 be reviewed to determine if there was authority to permit the filing of a claim for reimbursement under the Home Improvement and Structural Alterations (HISA) program within a prescribed period of time. The GC found that there was no authority to permit reimbursement in this program and that DM&S should publish regulations setting forth a procedure for reimbursement if they wish to permit such payments.

UNPUB GC October 10, 1982—The Board questioned the validity of VA Program Guide PG 21-1, "Compensation and Pension," Part 1, § E-9. This instruction did not permit application of the end-of-the-year rule in situations where there was a legal separation. GC held that the provisions of title 38 United States Code § 3012(b)(2) with respect to the reduction or termination of pension benefits did not contemplate marital separations. The questioned instruction was found to be valid and the effective date of reduction was the date of the marital separation.

UNPUB GC March 21, 1983—The Board questioned the validity of VA Manual M21-1, "Adjudication Procedure—Compensation and Pension, Dependency and Indemnity Compensation, Accrued Amounts, Burial Allowance, Special Benefits, Servicemen's Indemnity," par 53.03(a)(1) with respect to requiring a minimum period of 30 days in order to be eligible for a temporary total rating based on postsurgical convalescence (38 C.F.R. 4.30). GC noted that the regulation was silent as to any explicit requirement for a minimum period of postsurgical convalescence. They concluded that the text of this regulation reasonably implied a condition that the convalescent period contemplated at hospital discharge be for a period of one month or longer. They joined in our recommendation that DVB clarify their regulation to announce this policy.

Request January 24, 1983 (pending)—The Board questioned the validity of DVB Cir. 22-81-10 as to execution of a promissory note in connection with an education loan. GC has been requested to review the instruction to determine if it is consonant with the provisions of title 38 United States Code § 1798(a)(2), as added by Pub. L. No. 97-35.

(b) Questions concerning validity of Agency regulations.

UNPUB GC January 30, 1979—The Board asked the GC for an opinion reconciling title 38 United States Code § 628 authorizing reimbursement of certain medical expenses with a regulatory provision contained in 38 C.F.R. § 17.85(b). GC concluded that, to the extent the regulation would dictate a result contrary to the statute, it was erroneous. They also indicated an intent to recommend to DM&S that they issue a clarifying amendment.

UNPUB GC March 21, 1983—This opinion was discussed supra. Prior to the submission to GC, the Chairman of the Board requested DVB to amend 38 C.F.R. 4.30 by specifically prescribing a minimum requirement of 30 days postsurgical convalescence.

(c) Requests for reconsideration of prior General Counsel opinions.

UNPUB GC December 5, 1973—The Board asked GC to review prior GC opinions relative to entitlement to additional compensation for a spouse where the woman with whom the veteran is living may not be recognized as his legal wife. GC reaffirmed its prior opinions.

UNPUB GC May 11, 1978—The Board requested reevaluation of prior GC opinions relating to determinations of continuous cohabitation for purposes of an appellant's recognition as the surviving spouse of the veteran. GC responded that the prior opinions merely cited examples of instances where intention to permanently live apart from a veteran did not automatically defeat the rights of a spouse.

UNPUB GC July 6, 1978—This opinion was discussed supra. The submission resulted in GC reviewing prior opinion.

UNPUB GC October 2, 1978—OP GC 8-79, February 2, 1979—The Board requested a GC opinion relative to preservation of disability ratings pursuant to title 38 United States Code § 110, citing several earlier GC opinions. GC's response on that occasion specifically superceded any previously issued opinion of that office to the contrary.

Request March 1, 1983 (pending)—The Board requested the GC's review of an issue handled in two prior unpublished GC opinions. The issue involved in this requested reappraisal was application of 38 C.F.R. § 3.157(b) to entitlement to retroactive benefits when the disability involved was not previously service connected, but other unrelated disabilities were service connected in the past.

Senator CRANSTON. I would like to also note that section 4001 of title 38 provides that the Chairman of the BVA is, "* * * directly responsible to the Administrator."

The Administrator also appoints with the approval of the President, the members, chairman, and vice chairman of the BVA. Moreover, I see no restrictions in title 38 on the Administrator's power to remove the Chairman.

What greater independence does the Chairman have in terms of job security than other permanent VA employees?

Mr. **Eaton**. I would like to think that I have a great deal of security there.

Senator **Cranston**. I am asking the question of Mr. Murphy.

Mr. **Murphy**. Senator, right now my answer is that I am not aware of any. I will look at that and see if there is any reason to change that answer, but as I am seeing it right now, I am not aware of any.

Senator **Cranston**. Not aware of any what?

Mr. **Murphy**. Greater protection to the Chairman of the Board of Veterans' Appeals than another Veterans' employee.

Senator **Cranston**. Would you compare the independence of the BVA from the Administrator and the rest of the VA as compared to the attributes of independence attached to Federal judges?

Mr. **Murphy**. Relying on my personal knowledge in the time that I have been in the Veterans' Administration and my knowledge of the approach of individuals and people in that Veterans' Administration, including two Administrators, I would say that the independence, with the exception you have pointed out, Senator, of the legal opinions of the Office of General Counsel, is very similar. I would not abate readily the stature of the members of the Board of Veterans' Appeals.

Senator **Cranston**. How about life tenure?

Mr. **Murphy**. Well, as a matter of law, I don't think they have life tenure. In practice, they come close. If you have a Board member whose performance is not satisfactory, I think that that is up to the chairman and vice chairman to deal with in the ordinary administrative process of personnel law.

Senator **Cranston**. When one has life tenure, one has greater degree of independence than if one does not. S. 636 would permit a court to set-aside a BVA finding of fact only when the finding is, "* * * so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result," if it were not overturned.

You repeatedly describe this as the so-called rational basis standard, and on pages 9 and 10 you discuss a court case that compares the rational basis standard with the arbitrary and capricious standard.

What is the exact wording of the rational basis test that you are referring to?

Mr. **Murphy**. We are referring to the language you just quoted in the bill, Senator.

Senator **Cranston**. You are comparing the rational basis test in some court case I believe with the standard in S. 636. I want to know what that rational basis test from the court case is.

Mr. **Murphy**. Let me try to articulate the point we are trying to make a little further.

There is a U.S. Supreme Court case which says that the arbitrary and capricious standard is met if the decision being reviewed was rationally based.

Senator **Cranston**. That is not what the bill says.

Mr. **Murphy**. Well, that is existing judicial rule.

Senator CRANSTON. Let me ask the question again. S. 636 would permit a court to set-aside a BVA finding of fact only when the finding, is "* * * so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result" if it were not overturned.

That is very different than the rational basis standard.

Mr. MURPHY. I would have to say, Senator, that I am not so sure that the courts would view it as different. As I think the committee is well aware, the issue of arbitrary and capricious and what that means has had a tortured and long history inside the American judiciary.

Senator CRANSTON. On page 12 of your statement you note that the, in your words, purportedly narrower standard of review in S. 636 as compared with earlier proposals has not caused you to lower your estimates of the number of cases that would be appealed if the bill were enacted.

Is it your position that regardless of the standard for court review of factual issues ranging from de novo review to a restrictive standard as is included in S. 636 the number of filings would be the same?

Mr. MURPHY. Of course to some extent we have to speculate, we are going into the unknown, but I would say that the rational basis test, it would be my guesstimate if you will, that the rational basis test may very well result in more affirmations of the Agency position, but because a litigation or a claim is initiated, simply by the making of allegations in complaints and—attorneys are very adept at describing the standards they know they have to meet, I am not at all sure that it would reduce the number of cases with which we would have to deal.

Senator CRANSTON. Again, we do not have any reference to a rational basis test in this bill. We have a very different test that we propose, so I think there is no basis for the conclusion you come to.

Further, in light of the view expressed on page 13 of your statement that, "Attorneys will simply draft their pleading in conformance with whatever standard is provided," do you believe that restricting the scope of review to questions of law, that is, eliminating by law review of all fact issues, would have any effect on reducing the cases filed for review?

Mr. MURPHY. Yes. I think you would have a situation then in which the courts can look at the law—you know, you will have an issue of arguing law is a lot different than arguing facts when an attorney's freedom is being a more narrowly restricted area.

Senator CRANSTON. Wouldn't attorneys just be able to draft their pleadings so they seem to be making their case on questions of law?

Mr. MURPHY. Attorneys now in cases, as I am sure you are aware, draft pleadings to make constitutional allegations that are not particularly well founded. I think it is clear that attorneys can through draftsmanship make that sort of assertion.

What I am saying is that it is my belief that it is much easier for the courts and the Agency to deal with that attempt in a legal context than in a factual context.

Senator **Cranston**. On page 3 of your statement you state in opposing judicial review your preference for, "* * * a centralized body for determination on veterans' benefit claims."

I understand this is a reference to the Board of Veterans' Appeals, and I certainly don't see how this describes the way the BVA's 15 different panels operate in order for the BVA to be a centralized body that would eliminate, "* * * the prospect of inconsistent determinations." I believe that the BVA decisions would have to be given precedential effect. To accomplish such a result, BVA decisions would have to be indexed, published, or made available, and steps would have to be taken to insure that prior opinions were relied upon by the BVA itself as well as by VA regional offices.

Do you have any plans for achieving that sort of result?

Mr. **Murphy**. I think that we have largely achieved that by virtue of the fact that the Office of the General Counsel's opinions, the law if you will for this purpose, are in a centralized location, and there is one determination on the issue.

With respect to the BVA, I believe, and Mr. Eaton can comment if he cares to, that the vast majority, if not all of BVA's adjudications are presently factually intended.

Senator **Cranston**. I would like to ask Mr. Eaton, do you believe that presently BVA decisions have the effect of being precedential in that they are indexed, published and made available?

Mr. **Eaton**. We certainly do have an index published and it is made available to the public and to everyone. We do not have a completely precedential——

Senator **Cranston**. Are the opinions made available?

Mr. **Eaton**. Yes. Yes, sir, they are—all of them.

Senator **Cranston**. Where are they now?

Mr. **Eaton**. We have what we call an appellate index and retrieval staff. Anyone, any attorney, or any veteran can write us and ask for decisions having to do with a particular issue. These decisions, you understand, are sanitized. The veteran's name and C number are taken out, but other than that, they are complete, and we will send them copies of those decisions. We also disseminate throughout the country a microfiche index to Board decisions.

Now they are not precedential, however, even though we do have that. We make every effort to be consistent, and I think that in most every instance we are, but we do not have the precedent, legal precedent, as such. That is true.

Senator **Cranston**. Is it your view, Mr. Murphy, that the Board of Veterans' Appeals today is in your words a centralized body for the determination of VA claims that, "* * * eliminates the prospect of inconsistent determination"?

Mr. **Murphy**. Yes.

Senator **Cranston**. I would like to ask this for the record. Would you please provide citations and a brief description of the statutes mentioned on page 5 of your statement which preclude or restrict judicial review of administrative action? Please list separately those statutes which preclude review in individual claims involving statutory items.

Could you tell us how many are in the latter category, individual claims for statutory benefits?

Mr. **Murphy**. Mr. Lukey? This was asked a few minutes ago by——

Senator **Cranston**. I beg your pardon?

Mr. **Murphy**. This was asked a few minutes ago by Senator Simpson, Senator, and we are going to research it and provide that for the record.

Right now I am not aware of any.

Senator **Cranston**. Isn't the answer really one?

Mr. **Murphy**. I don't know.

Senator **Cranston**. If you would supply us the answer for the record?

Mr. **Murphy**. Yes, sir.

Senator **Cranston**. Thank you.

[Subsequently, the Veterans' Administration submitted the following information:]

As noted on page 5 of our statement, a study entitled "Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress" was prepared for the Administrative Conference of the United States. The appendix to that study listed various statutes which preclude or restrict review of administrative action. A copy of the appendix follows. We are aware of one statute on the list, 45 U.S.C. § 852(c), which was repealed since completion of the study.

Of the statutes listed above, several apply to individual claims for statutory benefits, although none precludes judicial review over as wide a range of benefits as 38 U.S.C. § 211(a). The benefit system most analogous to the VA's is that governed by the Federal Employees Compensation Act, 5 U.S.C. § 8128(b). Under the provisions of that statute, the Secretary of Labor's action allowing or denying compensation, medical treatment, or vocational rehabilitation for work-related injuries to Federal employees is not subject to judicial review. The other statutes restricting judicial review of individual claims for various statutory benefits are as follows:

a. 42 U.S.C. § 1715,
b. 50 U.S.C. App. § 2010,
c. P.L. 95-134, 91 Stat. 1160, Oct. 15, 1977, §§ 104(d) and 105,
d. 10 U.S.C. § 1084,
e. 37 U.S.C. § 403(h), and
f. 37 U.S.C. § 604.

Appendix
(current through 95th Congress)

I. Statutes containing explicit language precluding review of administrative action

A. Distribution of benefits, loans, grants and awards

38 U.S.C. §211(a) - Veterans' Administration

> "... decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors ... no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

5 U.S.C. §8128(b) - Federal Employees Compensation Act

> Secretary of Labor's action in allowing or denying compensation for work-related injuries to federal employees —
> "not subject to review by another official of the United States or by a court by mandamus or otherwise."

42 U.S.C. §1715 - War Risk Hazards Compensation Act

> action of Secretary of Labor in denying or allowing payments under the FECA, which is applicable to the War Risk Compensation Act, is not reviewable by same language as in 5 U.S.C. §8128(b).

22 U.S.C. §1623(h) - International Claims Settlement Act of 1949

> action of the Foreign Claims Settlement Commission in allowing or denying claims by U.S. citizens under the Act against foreign governments for taking their property —
>
> "not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

22 U.S.C. §1641m - same language is used to preclude review of the Commission's actions in denying claims against Bulgaria, Hungary, Rumania, Italy and the Soviet Union.

50 U.S.C. App. §2010 - precludes review of the Commission's action in approving or denying claims of specific groups incurring physical or property losses as the result of certain U.S. conflicts.

50 U.S.C. App. §2020 - Micronesian Claims Act of 1971 (terminated August 3, 1976).

> settlements and payments made by the Micronesian Claims Commission regarding claims of compensation for losses incurred by Micronesians during World War II are "not subject to review."

P.L. 95-134, 91 Stat. 1160, Oct. 15, 1977, §105 -

determinations by the Secretary of Interior that portions of awards made pursuant to Titles I and II of the Micronesian Claims Act are interest and are therefore excluded from payment amounts "shall not be subject to judicial review."

P.L. 95-134, 91 Stat. 1159, Oct. 15, 1977, §104(d) -

decisions by the Secretary of Interior to make payment to individuals or their heirs or legatees, who were residents of certain atolls in the Marshall Islands on March 1, 1954 as compensation for effects of the thermo nuclear explosion which occurred at Bikini Atoll on that date are "not subject to review by any other officials of the United States, or by any court by mandamus or otherwise."

10 U.S.C. §1084 -

Secretaries' of Defense and Health, Education and Welfare decisions concerning eligibility for certain benefits and services offered to dependents of military personnel for purposes of medical or dental care

"may not be reviewed in any court or by the General Accounting Office, unless there has been fraud or gross negligence."

37 U.S.C. §403(h) -

Secretary of Defense's determinations with regard to administration for basic quarters allowances for enlisted personnel, including questions of dependency and relationships, "not subject to review by any accounting office of the United States or a court, unless there is fraud or gross negligence."

37 U.S.C. §604 - designations by the Secretary of Defense as to whom may be paid amounts due a member of the uniformed services for his use or benefit, when that member is mentally incompetent to manage his affairs "not subject to review by an official of the United States or a court"

42 U.S.C. §3374(f) - Demonstration Cities and Metropolitan Development Act of 1966

determinations and decisions regarding payments and conveyances, the terms and conditions under which they are approved or disapproved, regarding title to property, eligibility for compensation, amounts payable and administration of the transactions, in acquiring title to, holding, managing, disposing of or reimbursing for losses upon private sale of residential property at or near a military installation closed by the Department of Defense, when owned by an employee of the installation "shall not be subject to judicial review."

12 U.S.C. §1735b(c) - National Housing Act

Secretary of Housing and Urban Development's decisions regarding expenditures to correct or reimburse for structural or other major defects in mortgaged homes that are federally insured "shall not be subject to judicial review."

38 U.S.C. §1827(b) - Veteran's Administration

Administrator's decisions regarding payments or expenditures and terms and conditions of such for correcting structural defects seriously affecting the livability of dwellings inspected during construction by VA or FHA, claims arising from such defects, or acquisition of title to such property, where it is encumbered by a mortgage made, guaranteed or insured under certain federal statutes "shall not be subject to judicial review."

20 U.S.C. §1132c-2(a) -

Financial transactions of the Commissioner of Education in carrying out a program of loans and insuring thereof to institutions of higher education for construction, reconstruction or renovation of academic facilities "shall not be reviewable by any court."

42 U.S.C. §1320a-1(f)-Social Security Act -

determinations by Secretary of Health, Education and Welfare to exclude federal payments for capital expenditures by state health care facilities under Medicare and Medicaid where the Secretary determines the expenditures were unnecessary "shall not be subject to administrative or judicial review."

42 U.S.C. §1320c-20(d)(3)(A) - Social Security Act

determinations by Secretary of HEW to suspend a PSRO's (Professional Standards Review Organization) authority when the Secretary decides that the actions of the PSRO have had unreasonable and detrimental impact on total State expenditures "shall not be subject to judicial review."

P.L. 95-291, 92 Stat. 306, Sec 4(c) (95th Cong. 2d Sess., June 12, 1978) -

determinations and findings of the Secretary of HEW regarding reimbursement to the States for expenditures regarding services rendered by the States under the Social Security Act

"No court of the United States has jurisdiction to entertain any action seeking the review of any determination or finding of the Secretary under this Act, or otherwise seeking to compel a determination by the Secretary to certify for payment any claim described by the first section of this Act."

26 U.S.C. §6305(b) - Social Services Amendments of 1974

Secretary of the Treasury shall assess and collect amounts certified by the Secretary of HEW as child support payments assigned to a state by a parent in an AFDC family for purposes of collection from a deserting parent.

"No court of the United States, whether established under article I or article III of the Constitution, shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary under subsection (a), nor shall any such assessment and collection be subject to review by the Secretary in any proceeding. This subsection does not preclude any legal, equitable, or administrative action against the State by an individual in any State court or before any State agency to determine his liability for any amount assessed against him and collected, or to recover any such amount collected from him, under this section."

15 U.S.C. §2703(f)(3) - Automotive Propulsion Research and Development Act of 1978

Secretary of Energy must certify each contract, grant or project made under the program for development of advanced automobile propulsion systems. The certification attests that a project, etc., meet certain requirements and discusses the relationship of the proposed research to related industry research.

"The provisions of chapter 5 of Title 5 shall not apply to certifications and no court shall have any jurisdiction to review the preparation or adequacy of such certification;"

22 U.S.C. §1641p(b) - Foreign Claims Settlement Commission

decision to grant a petition for remuneration to agents, attorneys or representatives of claimants, for services rendered in connection with claims, that asks for an amount in excess of 10% of total amount paid on a claim

"The determination of the Commission in ruling upon such petition shall be within the sole discretion of the Commission and shall not be subject to review by any court."

18 U.S.C. §4218(d) - Parole Commission and Reorganization Act

Actions of the U.S. Parole Commission granting or denying applications and recommendations for parole, imposing conditions on parole orders and modifying or revoking parole orders "shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5."

B. Management of publicly - owned resources.

42 U.S.C. §4602(a) - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

guidelines for acquisition of real property by agreement with owners, as offered in 42 U.S.C. §4651, "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

43 U.S.C. §1611(b) - Alaska Native Claims Settlement Act

the actions of the Secretary of the Interior and Alaska Regional Corporations in allocating land among villages are "not subject to judicial review"

43 U.S.C. §1652(d) - Trans-Alaska Pipeline Authorization Act

". . . the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified."

C. Policy decisions concerning achievement of certain national goals

45 U.S.C. §522 - Rail Passenger Service Act

The Secretary of Transportation's report designating the "basic system" of intercity rail passenger service is reviewed by the ICC, State Commissions, and representatives of the railroads and labor organizations. The Secretary is to give any comments and recommendations made in this review "due consideration" when making his final report to Congress.

"The basic system as designated shall become effective for the purposes of this chapter upon the date the final report of the Secretary is submitted to Congress and shall not be reviewable in any court."

45 U.S.C. §718(d)(2) - Regional Rail Reorganization Act

action of the U.S. Railway Association, a nonprofit incorporated association founded in accordance with the Act, in modifying the final system plan upon petition by a State is "not subject to review by any court."

45 U.S.C. §718(d)(3)(C) - modifications or additions for certain brief periods to designations of rail properties under the final system plan are "not subject to review by any court."

45 U.S.C. §719 - exclusive method of review of the final system plan -

may only be reviewed with respect to the value of rail properties to be conveyed and the value of consideration received. This review is to be done by a "special court" (3-judge district court), whose determinations may not be reviewed, except for their final order, which may be reviewed only by the Supreme Court if certiorari is requested within a certain period of time.

45 U.S.C. §852(c) -

All orders of the Operations Review Panel, which represents users of the Northeast Corridor rail transportation facilities, are "not subject to review by any court".

50 U.S.C. §47d(b) -

determinations of the Attorney General as to whether a person furnishing information concerning atomic weapons and special nuclear materials is entitled to a reward and the amount to be paid, when made after consultation with the Atomic Energy Commission, and with the approval of the President when the reward is more than $150,000, are final and conclusive and "no court shall have power or jurisdiction to review" them.

42 U.S.C. §2155(a)(2) - Nuclear Non-Proliferation Act of 1978

A decision by the NRC not to make certain narrow findings regarding export licensing procedures for special nuclear materials is not subject to review.

42 U.S.C. §2160a -

"No court or regulatory body shall have any jurisdiction under any law to compel the performance of or to review the adequacy of the performance of any Nuclear Proliferation Assessment Statement called for in this Act or in the 1954 Act."

50 U.S.C. App. §1216(a)(6) - Renegotiation Act of 1951 (now terminated).

Regulations designating classes and types of defense contracts which are exempt from provisions regarding excessive profits, and determinations that a contract is or is not exempt under the regulations "shall not be reviewed or redetermined by the Tax Court or by any other court or agency."

42 U.S.C. §1973b(b) - Voting Rights Act of 1965

determinations by the Attorney General and the Director of the

Census which lead to the inclusion of states or political subdivisions in the coverage of §1973b,d,k "shall not be reviewable in any court."

50 U.S.C. App. §460(b)(3) - Selective Service System

"... No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title ..., after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards and the President only when there is no basis in fact for the classification assigned to such registrant."

8 U.S.C. §1105a(b) - Immigration and Nationality Act of 1952

"(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise."

8 U.S.C. §1503(c) -

8 U.S.C. Sec. 1503(b) authorizes that certificates of identity may be issued by a diplomatic or consular officer of the United States in a foreign country to a person who claims a right or privilege as a United States' national and is denied the right or privilege by a department, agency or official thereof upon the ground that he is not a national. 8 U.S.C. Sec. 1503(c) provides that a person issued a certificate of identity under Sec. 1503(b) may apply for admission to the United States. Sec. 1503(c) states:

> "A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise."

D. Presidential actions with regard to foreign affairs

49 U.S.C. §1486(a) - Federal Aviation Program

orders concerning foreign air carriers subject to the approval of the President under 49 U.S.C. §1461 are not subject to review

II. Statutes whose language and legislative history have been interpreted by the courts to imply preclusion of judicial review under 5 U.S.C. §701(a)(1)

A. Benefits

42 U.S.C. §405(g) - Social Security Act

no judicial review of a decision by the Secretary of HEW not to reopen a previously - adjudicated claim for benefits

Califano v. Sanders, 430 U.S. 99 (1977)

42 U.S.C. §405(h) - Social Security Act

where it has been incorporated in another act without its corresponding provision 42 U.S.C. §405(g).

42 U.S.C. §1395ii
42 U.S.C. §1395oo
42 U.S.C. §1395u(b)(5)

*See full report for a discussion of the case law on this provision.

31 U.S.C. §242 - Military Personnel and Civilian Employee's Claims Act

settlement of claims by military or civilian personnel for damages to or loss of personal property incident to service

Macomber v. U.S., 335 F. Supp. 197 (D.R.I. 1971)

B. Emergency determinations in safety regulation

7 U.S.C. §135b(c),(d) - Federal Insecticide, Fungicide and Rodenticide Act

emergency actions by the Administrator concerning registration of economic poisons

NorAm Agricultural Products Inc. v. Hardin, 435 F.2d 1151 (7th Cir. 1970)

7 U.S.C. §1136 - Sugar Act

Secretary of Agriculture's findings in particular rate proceedings and the hearing upon which such findings are based
Mario Mercado e Hijos v. Benson, 231 F.2d 251 (D.C. Cir. 1956)
Casares v. Knebel, 557 F.2d 826 (D.C. Cir. 1976)

49 U.S.C §1429(a) - Federal Aviation Act of 1958

FAA Administrator's summary suspension of an airworthiness certificate when he finds the existence of an emergency

Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975)

C. Decisions regarding national labor policy and elimination of racial discrimination

7 U.S.C §1136 - Sugar Act

Secretary of Agriculture's determination to pay subsidies to certain producers of sugarcane and sugar beets who pay fair wages to their employees

7 U.S.C. §1385 - Soil Conservation Act
7 U.S.C. §1785 - National Wool Act

factual determinations underlying operations or payment are unreviewable

Gross v. *U.S.*, 505 F.2d 1271 (Ct. Cl. 1974); *Aycock - Lindsey Corp.* v. *U.S.*, 171 F. 2d 518 (5th Cir. 1948); *U.S.* v. *Moore*, 298 F. Supp. 199 (S.D. Ohio 1969); *U.S.* v. *Blackwell*, 467 F. 2d 1377 (5th Cir 1972).

42 U.S.C. §152, Ninth - Railway Labor Act

action by the National Mediation Board in using "appropriate" methods for ascertaining names for employees' representatives

Switchmen's Union of North America v. *National Mediation Board*, 320 U.S. 297 (1943)

Kirkland v. *Atlantic Coast Line R. Co.*, 167 F.2d 529 (D.C. Cir. 1948)

45 U.S.C. §153, First, (m) -

awards made by Railroad Adjustment Board on, of underlying grievances submitted to the Board

45 U.S.C. §153, First (a) -

those aggrieved by the failure of the Board to make an award or to include certain terms in an award made by the Board

factual determinations by the Railway Adjustment Board are not subject to judicial review

Union Pacific RR Co. v. *Sheehan*, 99 S Ct. 399, 439 U.S. 89, 1978.

NLRB's decision that hospital house staff are not covered by NLRB Act

Physicians National House Staff Assn. v. *Murphy*, 47 L.W. 2667 (April 24, 1979), vacated, 49 L.W. 2070 (D.C. Cir en banc, July 11, 1980)

U.S.C. §1973c - Voting Rights Act of 1965

Attorney General's failure to object within 60 days to the implementation of a voting law is not subject to judicial review

Morris v. Gressette, 432 U.S. 491 (1977)

Equal Employment Opportunity Commission determination of reasonable cause to believe that a charge of discrimination filed against a party was true

Georator Corp v. EEOC, 592 F.2d 765 (4th Cir 1979)

D. Suspension of rate changes

49 U.S.C. §15(7) -

ICC order suspending railroad rate changes - courts may not grant injunctive relief nor appraise reasonableness of rates
Arrow Transportation Co v. Southern Railway Co. 372 U.S. 658 (1963)
Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978).

16 U.S.C. §824d(e) -

FERC order suspending public utility rate changes

Municipal Light Boards v FPC, 450 F.2d 1341 (D.C. Cir 1971), cert denied, 405 U.S. 989 (1972).
Connecticut Light and Power Co. v FERC, D.C. Cir, D.C. No 78-2312, May 30, 1980.

III. Statutes that have been interpreted by the courts as committing agency action to agency discretion under 5 U.S.C. §701(a)(2).

A. Benefits, loans, grants and awards.

Termination of Veteran's Administration research grants—Kletschka v. Driver, 411 F.2d 436 (2d Cir 1969)

7 U.S.C. §904 - loans for rural electrification

Alabama Power Co. v. Alabama Electric Cooperative Inc., 394 F.2d 672 (5th Cir 1968), reh denied, 397 F.2d 809, cert denied, 393 U.S. 100

REA v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir), cert denied, 385 U.S. 815 (1966).

12 U.S.C. §1715l(d)(3) - National Housing Act

FHA decisions to grant rent increases

Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir 1970); Langevin v. Chenango Court Inc., 447 F.2d 296 (2d Cir 1971); Grace Towers

Tenants Assn. v. *Grace Housing Development Fund Co. Inc.*, 538 F.2d 491 (2d Cir 1976); *Harlib* v. *Lynn*, 511 F.2d 51 (7th Cir 1975).

B. National defense decisions that limit individual rights

50 U.S.C. App §32(a) - Trading with the Enemy Act

no judicial review for claims of enemy nationals
Schilling v. *Rogers*, 363 U.S. 666 (1960)

Action by the military denying a reservist's request for exemption from active duty - *U.S. ex rel Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir 1968), *cert denied*, 394 U.S. 929 (1969).

C. Administrative program management decisions

49 U.S.C. §15(8)(a), §13a(1) - ICC decisions whether to investigate legality of proposed rates, and rail carrier's proposed discontinuance of operation or services on interstate passenger trains
Southern Railway Co v. *Seaboard Allied Mining Corp*, 99 S. Ct. 2388 (1979); *City of Chicago* v. *U.S.*, 396 U.S. 162 (1969)

NLRB decisions to investigate or issue complaints for unfair labor practices
Vaca v. *Sipes*, 386 U.S. 171 (1967); *Saez* v. *Goslee*, *per curiam*, 463 F.2d 214 (1st Cir 1972), *cert denied*, 409 U.S. 1024; *Tensing* v. *NLRB*, 519 F.2d 365 (6th Cir 1975).

15 U.S.C §45(b) -

FTC's denial of a request to intervene in a precomplaint consent negotiation
Action on Safety and Health v. *FTC*, 498 F.2d 757 (D.C. Cir 1974)

31 U.S.C. §1221 - State and Local Fiscal Assistance Act of 1972

use of census figures as the controlling standard for allocating funds to state and local governments under the Act
City of Newark, N.J. v. *Blumenthal*, 457 F.Supp. 30 (D.C. D.C. 1978).

42 U.S.C. §1395g - Medicare Act

timing of payments to providers of services is discretionary and unreviewable
Greater New York Hosp. Assoc. v. *Mathews*, 536 F.2d 494 (2d Cir 1976)

19 U.S. §1618 - decision to allow remission or mitigation of a forfeiture of property under federal statutes

U.S. v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir 1964); Wiren v. *Eides*, 542 F.2d 757 (9th Cir 1976); *U.S.* v. *One 1957 Buick Roadmaster*, 167 F.Supp. 597 (E.D. Mich 1958).

D. Presidential policy decisions

10 U.S.C. §2631 - Cargo Preference Act

actions of the Executive pertaining to the reserve fleet's establishment expansion, curtailment, maintenance and use
Curran v. *Laird*, 420 F.2d 122 (D.C. Cir 1969).

E. Emergency regulatory determinations

7 U.S.C. §12a(9) - Commodity Exchange Act

decision to invoke emergency powers under the Act
Board of Trade of City of Chicago v. *CFTC*, 46 Ad L. 2d 309 (7th Cir, Sept. 12, 1979).

F. Management of publicly-owned resources

43 U.S. §§1411-18 - Classification and Multiple Use Act of 1964

classification of federal and as suitable for disposal or for retention, affecting the availability of land for homestead entry
Strickland v. *Morton*, 519 F.2d 467 (9th Cir 1975)

43 U.S.C. §315 - Taylor Grazing Act

decision of Secretary of Interior affirming the partial cancellation of grazing allotments
Mollohan v. *Gray*, 413 F.2d 349 (9th Cir 1969)

43 U.S.C. §682a - Small Tract Act

decision to classify land as suitable for transfer
Lutzenhiser v. *Udall*, 432 F.2d 328 (9th Cir 1970)

43 U.S.C. §620 *et seq* - Colorado River Storage Project Act

Secretary of Interior's action in contracting for the sale of hydroelectric power

Arizona Power Authority v. *Morton*, 549 F.2d 1231 (9th Cir. 1977), *reh. and reh. denied en banc*
City of Santa Clara, Calif. v. *Andrus*, 572 F.2d 660 (9th Cir. 1978).

16 U.S.C. §497 - National Forests

U.S. Forest Service decision to award a special use permit for operation of a resort in a national forest
Ness Investment Corp. v. *U.S. Dept. of Agric, Forest Service*, 517 F.2d 706 (9th Cir 1975).

16 U.S.C. §668dd(b)(3) - Endangered Species

Secretary of Interior's authority to transfer land title from the U.S. to public utility companies
Sierra Club v. *Hickel*, 467 F.2d 1048 (6th Cir 1972), *cert denied*, 411 U.S. 920 (1973).

Senator **Cranston**. Thank you, Mr. Chairman.

Chairman **Simpson** (presiding). I trust you had a spirited time while I was gone? Yes, I can tell you did. Thank you very much for your testimony, and we appreciate it.

Mr. **Murphy**. Thank you, sir.

[The prepared statement of John P. Murphy, General Counsel, Veterans' Administration, and the VA's response to written questions submitted by Hon. Alan Cranston, ranking minority member of the Senate Committee on Veterans' Affairs, follow:]

PREPARED STATEMENT OF JOHN P. MURPHY, GENERAL COUNSEL, VETERANS' ADMINISTRATION

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the Veterans Administration's views on S. 636, 98th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

The VA opposes enactment of the bill, and I would like to take this opportunity in appearing here today to provide the Committee with the general basis for our opposition. We are preparing a detailed report which will provide a more complete explanation of our position as well as a detailed analysis of the bill's provisions.

The bill contains four titles which contemplate numerous changes in present law concerning claims for benefits administered by the VA. First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions.

Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants who are dissatisfied with VA benefit decisions. Finally, the legislation would substantially revise the current $10 statutory limitation on the fee an attorney may receive for representing an individual claimant in prosecuting a claim for veteran benefits.

In addressing the various features of the bill, we note that the provision of overriding significance to this Agency and to veterans is title III, the provision for judicial review of individual VA benefit determinations. The remaining provisions of the bill largely seek to facilitate implementation of this change. We believe the proposed judicial review of individual VA benefit decisions is inadvisable and unjustified and we therefore oppose adoption of this measure in its entirety.

The principal issue raised by this measure is whether judicial review of individual VA benefit decisions is warranted. We are convinced that our present adjudication procedures provide a fair and efficient means of resolving veteran benefit claims and are preferable to a system involving judicial readjudication of individual benefit decisions. It is our considered opinion that the informal, non-adversary nature of our claim procedure, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to grant a claimant the benefit of the doubt, not only meets the requirements of due process, but provides greater protection to claimants than is available in comparable proceedings at other agencies.

Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective and practical method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts. Liberal rules for reopening claims and reconsideration of appeals by the Board also serve to insure justice for VA claimants. The review provided by the Board is independent and the VA has scrupulously maintained this independence.

Likewise, reliance on a centralized body for determination of veterans' benefit claims eliminates the prospect of inconsistent determinations resulting from litigation in the 94 district courts throughout the country. In our view, a veteran's entitlement to benefits is not a matter which varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending on the judicial district in which the veteran resides. We believe the BVA offers a more consistent and systematic approach to claim adjudication, without the frustrating cost and delay inherent in litigation.

The traditional arguments in support of judicial review of individual VA benefit decisions can be briefly summarized as follows:

1. Because of the tremendous volume of claims that are processed annually and the thousands of appeals filed, there is a significant opportunity for injustice to occur in the VA system;

2. The distinction between veterans and the claimants for other Federal benefits who are permitted access to the courts is unwarranted and should be eliminated; and

3. The lack of judicial review unconstitutionally denies veterans due process in the handling of their claims.

The initial persuasiveness of these arguments disappears under careful analysis. The first argument seeks to support the necessity for judicial review on the basis of a possibility of injustice. In fact, however, there is nothing to indicate that the current preclusion of judicial review results in injustice. To the contrary, as noted in this Committee's report on S.349, 97th Congress, there is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits. S. Rep. 97-466, 97th Cong., 2d Sess. 24 (1982).

The argument that veterans have been unfairly singled out in having review of their claims against the Government confined to administrative proceedings also does not withstand scrutiny. Although 38 U.S.C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes are relatively common throughout the Federal Government and continue to be enforced in a variety of situations. The Administrative Conference of the United States has identified some forty examples of statutes precluding or restricting judicial review of administrative action. Linda A. Sedivac, "Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress", October 1980.

Of course, many of these statutes address specific issues, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or severely restricted in such important areas as: selective service classification and processing; grant, denial, and revocation of parole; exclusion orders affecting arriving aliens; and determinations controlling coverage of states and localities under the Voting Rights Act. Particularly analogous is the provision of the Federal Employees Compensation Act, 5 U.S.C. § 8128(b), precluding, in language very similar to that used in section 211(a), judicial review of the grant or denial of compensation to Federal employees suffering work-related injuries. Thus, not only have veterans not been singled out for disparate treatment, the informal and supportive nature of the VA's administrative process provides a greater degree of fairness than may be available to participants in many other Federal programs.

The argument that the absence of judicial review of individual VA benefit decisions unconstitutionally denies veterans due process of law in the handling of their claims is likewise in error. Due process does not mandate judicial review.

As the District of Columbia Circuit Court of Appeals explained in DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir. 1972),

> The Supreme Court has declared that 'the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;' 'it may,' instead, 'provide an administrative remedy and make it exclusive . . . .' That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so.

Quoting from United States v. Babcock, 250 U.S. 328, 331 (1919), and Dismuke v. United States, 297 U.S. 167, 172 (1936)); see also Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 659 (1965). Contrary to the argument advanced, the courts--the branch of Government responsible for determining the constitutional requirements of due process--have not held that the absence of judicial review of individual VA benefit decisions violates due process.

Accordingly, the issue is not one of constitutionality but of preference. The Social Security Administration's experience with judicial review of the Social Security determinations as provided under the Social Security Act demonstrates that judicial involvement in administrative determinations concerning benefits is not preferable. The number of suits challenging Social Security determinations has risen drastically over the years to approximately 25,000 pending cases at the end of 1982. Based on fiscal year 1982 figures, Social Security cases were estimated by the Department of Justice to represent almost fifty percent of all civil actions commenced against the United States. The Department of Justice reported, in commenting on S. 349 in the 97th Congress, that it has experienced serious caseload problems since adoption of the judicial review provision pertaining to Social Security benefit determinations, and that it would expect to encounter a similar caseload expansion as a result of enactment of a judicial review provision affecting the VA.

A comprehensive review of the Social Security Administration adjudicatory process by the Center for Administrative Justice in 1977, in a report entitled the "Study of the Social Security Administration Hearing System", analyzed the contributions of judicial review to the Social Security Administration administrative process. The study concluded that any beneficial effect of judicial review on the accuracy of Social Security Administration adjudications is modest at best, while suggesting that such review may have some negative effects. For example, the study noted that district judges, not being specialists in hearing Social Security cases, may lack the perspective of agency appeals officers in assessing the validity of claims. The study also found that the threat of judicial reversal is in many cases too remote to have a measurable beneficial impact on the diligence of agency adjudicatory officials. The study also indicated that the creation of judicial precedents in individual benefit cases has had little positive impact on the administrative process. Finally, the study questioned the actual legitimizing impact of judicial review on the adjudication process. Given this background, the VA is unwilling to endorse any proposal which would create a system analogous to that involving the review of Social Security claims.

Contributing to the problems inherent in judicial review of VA benefits decisions is the difficulty in defining an appropriate standard of review. We continue to believe that any legislation subjecting such decisions to judicial review should be drafted to avoid confusion wherever possible. In our view, it is equally important that judicial review be limited to only those questions suitable for judicial determination, and that complex and technical factual questions that can best and most fairly be decided by the Agency not be subject to readjudication by the courts.

This bill attempts to limit judicial review of agency factual determinations by providing that the district courts shall set aside a finding of material fact made in reaching a decision on a benefit claim, when the finding is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result" if it were not overturned. We are concerned, however, that the grant of any authority to engage in review of agency factfinding on individual claims may encourage some courts to examine the facts de novo and substitute judicial judgment on factual matters for that of the Agency.

Not only is the standard of factual review that is provided in this bill without statutory or judicial precedent, the meaning of the term "rational basis" is far from settled. Judicial opinions suggest the very real possibility that the rational basis test and the nebulous concept of arbitrary and capricious agency action may be found to be equivalent. E.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974). Thus, adoption of a rational basis test may result in a standard substantially similar to the arbitrary and capricious test previously rejected by the Committee as inappropriate for review of VA factfinding. S. Rep. No. 97-466, 97th Cong., 2d Sess. 44-45 (1982).

The continued presence in the bill of the arbitrary and capricious standard for review of several aspects of VA benefit decisions may superimpose this concept as an alternative test when Agency decisions involve mixed factual and legal issues such as the sufficiency of the evidence relating to a factual matter.

Although this Committee noted the difficulty in distinguishing such issues in its report on S.349, supra at page 42, the scope of review provisions of the bill continue to require the courts to differentiate such issues in determining the appropriate standard to be applied.

Our review of the case law in this area reveals that considerable disagreement has arisen in cases with mixed questions of fact and law involving the application of a legal principle to the facts of a specific case. Because of the provision in the bill that a court shall set aside decisions of the Administrator other than findings of material fact, where those decisions are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, similar confusion and inconsistency may result in VA benefit cases. That is, some courts may apply the rational basis test to mixed questions while others may use the arbitrary and capricious standard.

Because of the recognized uncertainty surrounding the various standards of factual review, see K. Davis, Administrative Law of the Seventies § 29.00 (1976), and the difficulty courts have in observing statutory distinctions, we are concerned that any standard of review of factual aspects of VA benefit decisions will open the door to confusion and unwarranted judicial intervention. Although the view has been expressed that veterans cannot obtain complete review of their claims without some measure of judicial oversight of Agency factual determinations, we feel the problem of defining a standard which will preclude excessive judicial intrusion into the administrative process makes judicial oversight of fact-finding unworkable.

Further, we believe that judicial review of administrative determinations involving factual issues is particularly inappropriate and unnecessary in the case of the VA, in view of the Agency's liberal policy of assisting claimants in establishing entitlement to all benefits for which they are eligible under law. Moreover, the importance of judicial review of administrative fact determinations is substantially reduced by the governing principle in VA proceedings that the benefit of the doubt is to be resolved in favor of the claimant.

Additionally, we are concerned that the rational basis test proposed in the bill may interfere with the crucial role of Agency fact-finders in assessing witness credibility at administrative hearings. The potential for difficulty in this area exists because the claimant in a VA claims proceeding may in many cases be the only witness regarding key issues, see Brooks v. Cleland, 531 F. Supp. 103 (E.D. Mich. 1982), and crucial factual determinations may turn on the credibility of his or her testimony. A court applying the rational basis test may be reluctant to uphold an Agency fact-finder's determination, properly based on an assessment of the claimant's credibility, which is inconsistent with the uncontradicted testimony of the claimant. See Dickinson v. United States, 346 U.S. 389 (1953).

The purportedly narrower standard of review included in this bill, as compared with earlier proposals, has not caused us to lower our estimate of the number of cases which would be filed if a judicial review bill is enacted. We believe that attorneys will simply draft their pleadings in conformance with whatever standard is provided. The Agency decision will presumably be upheld with more frequency with a narrowly drawn standard, but the attendant burdens of litigating a large number of cases in order to vindicate the claims of a few would seem to be a disproportionate allocation of resources.

For all of these reasons, we believe that any attempt to provide judicial review of VA factual determinations regarding benefit claims would be subject to expansive interpretation by the courts and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans.

With regard to the remaining provisions of the bill, we note that many of the adjudicatory procedures included in title I merely restate existing agency practices, while others are clearly intended to complement the provisions concerning judicial review contained in title III. Some are administratively burdensome or expensive, with little prospect of worthwhile results from their implementation. In our view, this title is unnecessary in the absence of judicial review and we recommend against its adoption.

With respect to the provisions of title II of the bill, we note that the Agency has voluntarily complied with the rule-making requirements of 5 U.S.C. § 553 since April 1972. At that time 38 C.F.R. § 1.12 was promulgated, expressly requiring notice of regulatory changes to be published in the Federal Register in accordance with section 553. This regulation is binding on all elements of the VA.

Finally, we are not prepared to support the significant alterations to the present statutory attorney fee limitation, 38 U.S.C. § 3404, that would occur under title IV of this bill.

In summary, it is the VA's position that the present system for the informal adjudication of claims for veteran benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claims adjudication have not been adequately justified. The remaining major provisions of the bill are largely dependent on the adoption of judicial review of individual VA benefit decisions and are unnecessary in the absence of such review. For these reasons, we oppose passage of S. 636.

RESPONSE OF THE VETERANS' ADMINISTRATION TO WRITTEN QUESTIONS SUBMITTED BY HON. ALAN CRANSTON, RANKING MINORITY MEMBER OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

QUESTION 1: On page 1 of your statement, you indicate that you "are preparing a detailed report" on S. 636. When will this report be submitted to the Committee?

ANSWER 1: Our detailed report on S. 636 has been completed and is being coordinated within the Veterans Administration (VA) and with the Office of Management and Budget. We will submit the report to the Committee as soon as clearance is obtained.

QUESTION 2: On page 2 of your statement, you state that the present adjudication procedures "are preferable to a system involving judicial readjudication of individual benefit decisions." I agree that "judicial readjudication" of VA benefit decisions is not appropriate or desirable. How does S. 636 provide for such "readjudication" by a court?

ANSWER 2: S. 636 provides that a claimant for veterans' benefits may obtain district court review of any adverse final decision of the Administrator of Veterans Affairs in a matter involving a claim for benefits (proposed new section 4025(b)). In such an action, the Administrator is required under the bill to file a certified copy of the records upon which the decision complained of is based (proposed new section 4025(d)). The whole record submitted to the court is made subject to review (proposed new section 4026(b)). The court is directed to decide questions of law involved in the decision (proposed new section 4026(a)(1)(A)), to set aside decisions found to be arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law (proposed new section 4026(a)(1)(C)(i)), and, in the case of findings of material fact, to set aside findings so utterly lacking in rational basis in the evidence that a manifest and grievous injustice would result if the finding were not set aside (proposed new section 4026(a)(1)(D)). In this way, the court will be presented with the complete record considered by the administrative decisionmaker and will be required to review all legal and factual matters in issue and set aside any decision not meeting specified standards. Such review constitutes judicial readjudication of individual benefit decisions.

QUESTION 3: On page 7 of your statement, you mention the Social Security Administration's experience with judicial review of decisions under the Social Security Act.

QUESTION 3A: On the basis of the most current information, what percentage of SSA cases appealed to court is reversed and what percentage is remanded and, of those remanded, what percentage are ultimately resolved in favor of the claimant?

ANSWER 3A: Figures published by the Social Security Administration (SSA) in its "Operational Report of the Office of Hearings and Appeals", September 30, 1981, indicate that in fiscal year 1981 SSA action was affirmed by U.S. district courts in 4006 cases involving claims for Social Security benefits. In that fiscal year, SSA action was reversed in 1317 cases and 764 other cases were dismissed for some reason. The Office of Hearings and Appeals figures also indicate that 3262 cases were remanded for further administrative action during fiscal year 1981. Our own computations based on these figures show that, of cases disposed of by affirmance, reversal or remand, approximately 15 percent were reversed and 38 percent were remanded. If dismissals are included in the computation, the result is approximately 14 percent reversed and 35 percent remanded. Unofficial figures on affirmances and reversals in fiscal year 1982 are roughly comparable to the figures reported for fiscal year 1981. Of course, we cannot independently verify the figures reported, and authoritative interpretation of these figures is a matter within the expertise of the SSA. We have no recent data on the percentage of remanded cases ultimately resolved in favor of the claimant.

QUESTION 3B: You mention that the Department of Justice estimates that "almost fifty percent of all civil actions commenced against the United States" in 1982 were social security cases. What percentage of the Department's actual workload of Department attorneys involved in civil litigation was taken up by these cases?

ANSWER 3B: Informal inquiry to the Department of Justice (DoJ) has not resulted in any information on this point. Time constraints in responding to your question did not permit us to formally request the development of such figures by DoJ.

QUESTION 4: On page 3, you also state, "We believe the BVA offers a more consistent and systematic approach to claim adjudication, without the frustrating cost and delay inherent in litigation."

QUESTION 4A: Do you mean to imply that providing for judicial review, as in S. 636, would diminish the ability of the BVA to function consistently and systematically? If so, please explain how that would occur.

ANSWER 4A: Yes. Reliance on a centralized body, the Board of Veterans Appeals, which strives for consistency in its handling of veterans' claims, is preferable to a system involving a multiplicity of district courts across the country. The potential for contradictory approaches to resolution of both legal and factual matters is inherent in such a system of court review. In spite of the Board's goal of consistency, inconsistent judicial precedent is likely to impinge on the Board's ability to make decisions in a coherent manner.

QUESTION 4B: Do you mean to imply that, because obtaining court review of a BVA denial of a claim would take some time and entail some cost, having the option of court review available (as under S. 636) would be disadvantageous to a veteran whose claim has been denied by the BVA? If so, please explain specifically how the veteran would be disadvantaged.

ANSWER 4B: No. We do not mean to imply that the mere availability of court review would be disadvantageous to veterans whose claims have been denied. However, we do not believe that access to the courts provides the advantage to veterans suggested by some supporters of judicial review. Many veterans may pursue judicial review of their claims only to find that, after lengthy delays, they have gained nothing and are faced with substantial bills for attorneys' fees, court costs, and filing fees. Further, in view of the limited expertise of district court judges with veterans' claim matters, and the VA's responsibility to assist claimants in obtaining every benefit to which they are legitimately entitled, it cannot be said that judicial review would provide veterans with a fairer review of their claims than is already available from the Agency.

QUESTION 5: On page 14 of your statement, you indicate that you "are not prepared to support the significant alteration [proposed in S. 636] to the present statutory attorney fee limitation."

QUESTION 5A: What is the reason for your position on this issue?

ANSWER 5A: We believe that, in the absence of judicial review, modification of the present limitation on attorneys' fees is neither necessary, nor desirable. In our view, the informal, nonadversary nature of VA adjudicatory procedures, the liberal standards for evaluation of claims, and the availability of free representation by trained service organization representatives provides a better system for resolution of claims than one involving paid advocates.

QUESTION 5B: Are there alterations that are less significant that you would support?

ANSWER 5B: Even if VA benefits decisions were subject to judicial review, we would have reservations concerning several provisions of S. 636 governing the award of attorneys' fees. In particular, we are concerned with the broad discretion granted the courts in setting attorneys' fees in cases where no contingent fee arrangement is involved, the authority to administratively increase the $500 fee limitation in cases involving extraordinary circumstances, the availability of unlimited punitive awards of attorneys' fees against the government, and the fact that such fee awards would be based on a standard which differs from that provided under the Equal Access to Justice Act. Our concerns on these points are described in greater detail in our report on S. 636.

QUESTION 6: With further reference to the issue on attorneys' fees under chapter 59 of title 38, section 3404(c) imposes a $10 limitation on the fees that "attorneys recognized under [section 3404]" can charge for representing claimants before the VA. Section 3401 generally allows an individual to represent a claimant before the VA only if the individual has been "recognized for such purposes by the Administrator." However, section 3401 contains an exception to the recognition requirement for any attorney who, pursuant to section 500 of title 5, is generally authorized to represent others before federal agencies, that is, an attorney "in good standing of the bar of the highest court of a state." Thus, it might be argued that an attorney who is representing a claimant before the VA solely by virtue of this exception to the recognition requirement is not subject to the fee limitation set forth in section 3404.

QUESTION 6A: (part i) In your view, does the exception in section 3401 permit an attorney who meets the title 5, section 500 requirements to charge more than $10 for representing a VA claimant?

QUESTION 6A: (part ii) Would an attorney be permitted to represent a claimant before the VA without being recognized by the Administrator pursuant to section 3404(a)?

ANSWER 6A: Parts (i) and (ii) of question number 6A are answered together as follows:

We do not believe section 500(b) of title 5 exempts attorneys desiring to represent claimants before the VA from being recognized under section 3404(a) of title 38, and, therefore, the $10 fee limitation in section 3404(c) remains applicable to all attorneys representing VA claimants. Although, in light of section 500(b), we believe no additional qualifications for recognition of attorneys may be required by the Administrator, recognition is granted under the authority of section 3404(a) (although such recognition is, for all intents and purposes, Answer 6A: (parts i and ii continued)

automatic). The Administrator retains authority to regulate for the additional purposes of allowing access to claimants' official VA records and maintaining limited review of such attorneys' conduct in relation to claimants and the VA. We believe any other interpretation would be in direct conflict with expressed Congressional intent to the contrary.

Section 3401, as amended provides as follows:

> Except as provided by section 500 of title 5, no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Veterans' Administration unless he has been recognized for such purposes by the Administrator.

Section 500(b) of title 5 provides as follows:

> (b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

Answer 6A: (parts i and ii) continued

Section 3401 was amended to its present form by Pub. L. No. 91-24 (June 11, 1969). Section 12(a) of the law substituted the phrase "Except as provided in section 500 of title 5, no individual may act" for "No individual may act." This change was one of many technical amendments to title 38. In fact, the public law's short title reads "An Act to amend title 38 of the United States Code in order to make certain technical corrections therein, and for other purposes."

The legislative history of this public law clearly indicates that "The bill [H.R. 648] makes no substantive changes in present law; it merely makes technical corrections." S. Rep. No. 91-217, 91st Cong. (1969), reprinted in 1969 U.S. Code Cong. & Ad. News 1022. A section-by-section analysis pertaining to section 12 states that "Subsection (a) amends section 3401 of title 38 to incorporate the exception contained in section 500 of title 5, United States Code (originally enacted as Public Law 89-332), allowing certain persons to act on behalf of claimants." S. Rep. No. 91-217, 91st Cong. (1969), reprinted in 1969 U.S. Code Cong. & Ad. News 1022, 1025.

Section 500, title 5 was enacted by Pub. L. No. 93-83 (September 11, 1967). This section was derived from a provision of Pub. L. No. 89-332 (November 8, 1965),

Answer 6A: (parts i and ii) continued

"An act to provide for the right of persons to be represented in matters before Federal agencies." This public law was not codified but was included in the Appendix to title 5, section 1012. Its stated purpose was to "do away with agency-established admission requirements for licensed attorneys, and thus allow persons to be represented by counsel of their choice." H.R. Rep. No. 1141, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 4170, 4171. The VA was typical of Federal agencies at that time, in that we required a special application to be made before an attorney would be recognized or approved to represent a claimant.

The VA regulation implementing section 3404 then in effect (VA Regulation 5629(B)) read in pertinent part as follows:

> (B) Recognition of attorneys may be granted by a Chief Attorney or by the General Counsel. Any member in good standing of a bar of State, Territory or possessions of the United States, or of the bar of the District of Columbia . . . *may apply for recognition* as attorney on VA Form 2-3186, Application for Recognition as Attorney . . . . (December 20, 1955). (emphasis ours.)

Answer 6A: (parts i and ii) continued

However, shortly after enactment of Pub. L. No. 89-332, the VA revised VA regulation 5629 to read in pertinent part as follows:

> (B)(1) The submission of a written declaration by a person stating that he is a member in good standing of the bar of the highest court of a State . . . and that he is authorized to represent a particular claimant in whose behalf he acts will, in the absence of contrary evidence, entitle him to represent the claimant and have access to information in VA files which would be available to the claimant in accord with VA Regulations 503 and 504.
>
> (2) Such attorney shall not be required to submit a power of attorney from the claimant . . . . (December 16, 1966).

The present VA regulation, (38 C.F.R. § 14.629) provides in pertinent part as follows:

> (c) Attorneys. Attorneys shall state in writing on their letterhead that they are authorized to represent the claimant in order to have access to information in the claimant's file pertinent to the particular claims presented. For an attorney to have complete access to all information in an individual's records, the attorney must provide a

Answer 6A: (parts i and ii) continued)

> signed consent form from the claimant or the claimant's guardian. The consent shall be equivalent to an executed power of attorney. (October 10, 1978).

In essence, attorneys complying with this provision are automatically recognized by the VA and granted access to information pertinent to the individual's claim. Thus, it is clear that the practice of automatically recognizing attorneys has existed since 1966, before the amendment was made to section 3401.

The $10 attorney fee limitation is contained in section 3404(c) as follows:

> (c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits . . . Such fees - . . .
>
> (2) shall not exceed $10 with respect to any one claim . . . .

Your question draws particular attention to the words "recognized under this section" and raises the issue of whether attorneys complying with

Answer 6A: (parts i and ii) continued)

section 500(b) of title 5 need to be "recognized" by the Administrator under section 3404. The question implies that a literal reading of section 3401 would distinguish individuals eligible under section 500 from those recognized under section 3404. However, if section 3401 were to be construed in this manner, only those attorneys recognized under section 3404 would be restricted to the $10 maximum fee. In essence, by adding the phrase "Except as provided in section 500 of title 5" Congress would have inadvertently created a new statutory authority excepting certain attorneys from fee limitations which have existed in one form or another for over a century. The compensation of persons assisting those entitled to VA pensions to obtain them has at all times been the subject of regulation by law of Congress. Morgan v. Davis, 47 Vt. 610 (1874). As early as July 14, 1862, Congress limited the fees of agents or attorneys who assisted claimants. Furthermore, it is quite clear that the intent of such legislation was to protect veterans from the predatory practices of unscrupulous agents and attorneys. In enacting the 1969 amendment to section 3401, Congress' intent was clear that all amendments made by Pub. L. No. 91-24 were technical in nature and did not amount to substantive changes in the law.

Answer 6A: (parts i and ii) continued

It should be observed that Federal courts have consistently upheld the constitutionality of section 3404 and its predecessors. Gendron v. Saxbe, 389 F. Supp. 1303 (D. Cal. 1975), aff'd, sub nom., Gendron v. Levi, 423 U.S. 803 (1975); Hines v. Lowery, 305 U.S. 85 (1938); Margolin v. United States, 269 U.S. 93 (1925); and Hoffmaster v. Veterans Administration, 444 F.2d 192 (3d Cir. 1971).

It is important to note that although section 3404 has been the subject of several Federal court cases we can find no case since the 1969 amendment of section 3401 (directly relating to recognition of attorneys) which even implies that the fee restriction in section 3404 is not applicable to all attorneys practicing before the VA.

We do not believe section 3401 would be construed by the courts to create an exception to the $10 fee limitation. Such a construction would clearly be contrary to express Congressional intent that the changes made by Pub. L. No. 91-24 would effect no substantive changes in the law and the historical Congressional intent that fees charged by attorneys representing VA claimants be restricted. In this

Answer 6A: (parts i and ii) continued

regard, it has been stated that "the plain meaning rule . . . is not to be used to thwart or distort the intent of Congress by excluding considerable enlightening material from the legislative files." FCC v. Cohn, 154 F. Supp 899 (S.D. N.Y. 1957).

The Supreme Court has declared that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." National R. Passenger Corp. v. National Association of R. Passengers, 414 U.S.453 (1974). There is also support for the view that the process of interpretation should commence with consideration of the legislative history to uncover any indication of legislative intent." United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975).

Therefore, we believe an interpretation of the exception in section 3401 referring to section 500 of title 5 should be viewed in terms of the underlying purpose of section 500 itself, the Public Law from which it was derived, and the direct expressions of Congressional intent set forth in the legislative history of Pub. L. No. 91-24.

ANSWER 6A: (parts i and ii) continued

We believe the language of section 3401 should be construed as limiting the criteria which the VA may impose on attorneys who are members in good standing of a State bar in order that they be recognized as claimants' attorneys and also so that they may have access to pertinent records in claimants' VA files.

We do not believe the general provision in section 500 of title 5 exempts attorneys from recognition under section 3404(a) (although for all intents and purposes such recognition is automatic) and its implementing regulations. Nor are such attorneys exempt from criminal penalties set forth in section 3405 of title 38 or from the provisions of section 3404(b) which provide the Administrator authority to exclude from further practice before the VA attorneys who (1) have engaged in any unlawful, unprofessional, or dishonest practice; (2) have been guilty of disreputable conduct; (3) are incompetent; (4) have violated or refused to comply with laws administered by the VA or laws or regulations governing practice before the VA; or (5) have deceived, misled or threatened any actual or prospective claimant.

QUESTION 6B: Do you believe that section 3401, 3404, and 3405 read together provide sufficient notice of a criminal prohibition to sustain a conviction against an attorney who meets the title 5, section 500 requirements, did not seek section 3404 recognition, and has charged and received a fee in excess of $10 for representing a VA claimant?

QUESTION 6C: Have any such instances come to the VA's attention either formally or informally?

QUESTION 6D: Please describe any amendments to chapter 59 that you would consider necessary or appropriate in light of your responses to A and B, above.

ANSWER 6B,C, and D: Based on the answer to question 6A above, we think the statute clearly limits fees for all attorneys representing claimants for VA benefits under title 38. However, we must acknowledge that we know of no cases where the argument suggested in question 6 has been raised. In light of our interpretation of the statutes discussed in this question, we have no suggestions for change.

QUESTION 7: On page 13 of your statement, you note that some of the provisions that are included in title I of S. 636 "are administratively burdensome or expensive, with little prospect of worthwhile results from their implementation." Which specific provisions -- other than those that the Administrator has discretion to implement or not to implement -- are you referring to?

ANSWER 7: Several provisions of title I of S. 636 would impose new burdens or expense while offering little prospect of improvement in procedures or increased fairness to claimants. Among the proposals which we consider particularly troublesome in this regard are those providing for written interrogatories and subpoenas for depositions, advisory medical opinions in cases of substantial disagreement between physicians, and copying of case files and other documents and records used by the Agency in a proceeding. Our objections to these and other provisions are detailed in our section-by-section analysis of title I. However, our reference to potentially burdensome and expensive requirements includes the discretionary studies provided for in section 110 of the bill.

Chairman SIMPSON. And now Frederick Davis—Mr. Davis, if you would come to the witness table, Frederick Davis of the American Bar Association, dean of the University of Dayton School of Law, Dayton, Ohio. And we have Senator Boschwitz, a new member of the committee, a very helpful and productive member, and Senator Murkowski, who is here at the hearing, and if either of you have any statement you would wish to make, feel free to do so. If not, I certainly appreciate your being here.

Senator MURKOWSKI. Thank you, Mr. Chairman. I have a brief statement. I would request that it be entered into the record. I would like to highlight one point.

I am in support of S. 636 which I cosponsored this last year. I would like to verbally refer to the discussion on how this bill relates to a specific benefits case in Alaska during the past year which I feel quite strongly about.

We have struggled with the Veterans' Administration concerning the effect of Alaska's perhaps one-time dividend program on veterans' pension benefits, and I have argued that the State program that would return to Alaska some of the profits from the sales of oil leases should not be computed as additional income because of the sixth exemption under title 38, section 503.

This provision states that profit realized from disposition of personal property will not be considered income for the purpose of computing pension benefits. The State dividend is paid from revenue from bids for the leasing of public oil and gas lands, and if the public isn't made up of the people, I don't know what is.

Who does it belong to? It belongs to the people, and therefore it is evident that it is in effect personal property. I believe this revenue consists of profit realized from the sale of personal property for it comes from the lands owned by all Alaskans, not as individuals as in the case of all other oil-producing States. It is owned by the State of Alaska, hence the residents.

I have also noted to the VA that the benefits in question represent a minuscule portion of the VA budget. However, for Alaska's VA pension recipients whose income is about $5,000 annually—a State which has one of the highest costs of living—this money represents in many cases their lifeline. We cannot be insensitive to the needs of those living on a shoestring. If there was ever a time for a safety net, this is it. There was no precedent for the VA to take into account when considering this case, and there is unlikely to be one in the future since no other State is considering a dividend program such as Alaska's.

Therefore, I contend that the VA has the administrative flexibility to rule that the dividend money qualifies for the sixth exemption or personal property exemption.

Unfortunately, the VA has not seen fit to agree to address this solution in a fully satisfactory manner, and therefore, I am investigating the advisability of legislation which would overturn the VA ruling.

Mr. Chairman, the balance of my remarks will be entered in the record, but I will tell you on the number of recipients which we have, which are 600, the cost of taking them off the program and then reenrolling them is far in excess of the benefit that they get from this what I believe will be a one-time dividend.

Thank you, Mr. Chairman. I did want to make that point for the record, and again I would ask that my entire statement be entered into the record.

Mr. MURPHY. Mr. Chairman, if I could ask that we submit the opinion involving the Alaskan issue for the record?

Senator MURKOWSKI. Mr. Chairman, I would appreciate the opinion being a rather expansive opinion on just who is governing? That seems to be where we get hung up. In this case it is personal property, and if residents in the State of Alaska on any sale of something State owned, namely, State land—I fail to catch the legal grasp of the interpretations, so if you could expand on who is governing I think we could both get a satisfactory answer.

Mr. MURPHY. It will be at a merely theoretical level.

Senator MURKOWSKI. It is probably theoretical in a sense, but it is something that we deal with all the time. If we don't know who or what we are, one has to wonder.

Thank you for your patience.

[Subsequently, the Veterans' Administration submitted the following information:]

As requested by Senator Murkowski, we have attached for the record a copy of an opinion in the form of a memorandum from the General Counsel to the Chief Benefits Director, dated January 6, 1983. The memorandum advised the Chief Benefits Director that the dividends paid to Alaska residents under its Permanent Fund Dividends program were required by law to be counted as income for purposes of computing the eligibility for, and the monthly rate of, non-service-connected pension benefits. The opinion includes an interpretation and analysis of the pension provisions in chapter 15 of title 38, United States Code, with particular emphasis on section 503(a)(6). That provision allows an exclusion from countable income for "profit realized from the disposition of real or personal property other than in the course of a business." I simply am not able to construe the Alaska permanent fund dividend payments as disposition of property by the individual Alaska residents. Therefore, the payments must be considered as income to the individual pensioner or pension applicant.

This result is quickly put in its proper perspective by considering the congressional purpose of the non-service-connected disability and death pension programs and the parents' dependency and indemnity compensation program. These are need-based programs designed to provide at least a very basic level of support for veterans and survivors who are in financial need. Except for several specific exclusions set forth by law, all payments of money to such individuals are considered available to measure their financial need. The payment authorized by the State of Alaska to each of its residents during 1982 was $1,000. This is clearly an amount substantial enough to bear on the financial need of each pensioner.

Senator Murkowski raised a concern over the distinction between the State as an entity separate from its people. Our analysis included discussion of this point in paragraphs numbered 13 through 15. The State of Alaska must be considered a legal entity separate from the residents of the State in determining the question of legal title and, therefore, "ownership" of the land and its mineral resources.

My opinion of January 6, 1983, follows:

JAN 6 1983

Chief Benefits Director (20)

Request for Opinion on State of Alaska Permanent Fund Dividends as Income or Net Worth for VA Pension and DIC Purposes

1. This is in response to your request for an opinion as to whether the newly-enacted State of Alaska "permanent fund dividends" (Alaska Stat. § 43.23 (1982)) constitute countable income for the purposes of 38 U.S.C. §§ 415, 521, 541 and 542, and section 306, Pub. L. No. 95-588, and, in the case of certain unemancipated minors, should be included as part of their net worth.

2. We have concluded that the "permanent fund dividends" (PFD) in question constitute income for the purposes of the above-cited sections of title 38, United States Code, and section 306, Pub. L. No. 95-588, when received by emancipated minors, persons over the age of majority or representative payees on behalf of unemancipated minors or incompetent persons. We have further concluded that the unpaid prior year PFD (Alaska Stat. § 43.23.014 (1982)) and any interest accrued thereon while a person is under the age of 18 does not constitute income for the purposes of the aforementioned sections and is not a part of their net worth.

3. Resolution of the questions presented requires an analysis of the provisions governing countable income and net worth limitations for the purposes of 38 U.S.C. §§ 415, 521, 541, 542 and section 306, Pub. L. No. 95-588, as they relate to certain provisions of the State of Alaska's laws summarized below.

4. The payments in issue, "permanent fund dividends," emanate from the State's Dividend Fund (Alaska Stat. § 43.23.045 (1981 Supple.)). This fund consists of a portion of the income earned on the Alaska Permanent Fund (Alaska Const. Art. IX, § 15). The principle of this latter fund is derived from a portion of the State's revenues from "mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses."

5. The following portions of the State's Permanent Fund Dividend Law are pertinent to the questions presented:

§ 43.23.005	Establishes basic eligibility for payments of annual dividends to Alaska residents, and requires that an application be filed by the individual or in the case of an unemancipated minor or incompetent person, by a parent, guardian or other representative payee.
§ 43.23.015	Payment made on behalf of an individual to a public agency is held in trust for the individual.
§ 43.23.045	The State's Department of Revenue may, consistent with Federal law, permit a dividend payment plan that would have the effect of deferring all or a portion of Federal income taxes due on an individual's dividend.
§ 43.23.075	Where assistance is denied because an individual's PFD is required to be counted as income or resources under Federal law or regulation, the State will, for a period not in excess of 4 months, make a payment equal to the amount of the assistance reduction. These payments will be made from the State's general relief program (State's welfare program).
§ 43.23.014	Provides for the payment for prior years to an individual for whom no application for PFD was made while the individual was under age 18. Application for prior years PFD must be filed within 1 year of the individual's 18th birthday.

6. Income determinations for the current VA pension program are governed by 38 U.S.C. § 503(a) while its predecessors, those in effect on June 30, 1960 and on December 31, 1978, govern entitlement to the continued receipt of prior pension program benefits by virtue of section 306, Pub. L. No. 95-588. The language of these sections generally require that all payments are to be included in computing annual income unless the payment in question is derived from a source that is specifically excluded by statute. A similar statutory scheme is applicable to income determinations for dependency and indemnity compensation program purposes. 38 U.S.C. § 415(f)(1).

7. None of the exclusions delineated in the current section 503(a) or its predecessors or in section 415(f)(1) specifically addresses the payments in question. However, one exclusion, "profit realized from the disposition of real or personal property other than in the course of a business" found currently at section 503(a)(6), at section 503(a)(10) as in effect on December 31, 1978, and, at section 415(f)(1)(K) warrants analysis to determine whether the payments in question may be considered profit realized from the disposition of property.

8. The "disposition of property" exclusion was first enacted into law by Pub. L. No. 88-664, § 1, 78 Stat. 1094, October 13, 1964, and amended the then existent pension program which is now referred to as section 306 pension. This exclusion was made applicable to the section 415 DIC program by Pub. L. No. 89-730 § 2, 80 Stat. 1157, 1158, November 2, 1966. The legislative history of this section reflects that this exclusion was extended to the section 415 DIC program to ensure that the income of DIC recipients was treated the same as that of pension recipients. S. Rep. No. 1300, 89th Cong., 2d Sess. 4, reprinted in 1966 U.S. Code Cong. and Ad. News 3780, 3783. Therefore, the legislative history of Pub. L. No. 88-664 regarding this exclusion is pertinent to both the section 306 pension and DIC programs. This history is also applicable to the current exclusion, section 503(a)(6), since the exclusionary language has not been changed; only its position in the statute has changed. We must also examine the manner in which property sale proceeds were handled for VA pension purposes prior to the enactment of Pub. L. No. 88-664.

9. Regulations, issued pursuant to the Administrator's authority to interpret the statutory term "income," controlled how property sale proceeds were treated for VA pension

purposes prior to the enactment of Pub. L. No. 88-664. These regulations were concerned with the treatment of real property sale proceeds where such property was owned jointly or otherwise by a veteran and his/her spouse during the veteran's lifetime and real property that passed by inheritance or otherwise to a surviving spouse upon the veteran's death. The primary real property addressed by these regulations was the home wherein the veteran and his/her spouse resided during the veteran's lifetime.

10. Analysis of the "disposition of property" exclusion legislative history clearly shows that the exclusion was primarily intended to expand the then-partial exclusion concerning the sale of a home to include the profits derived from the sale of any property not used in business. This expansion recognized that the basis of the then existing partial exclusion--conversion of assets from one form to another--was equally applicable to the disposition of any property other than in the course of business. See, Hearing on H.R. 1927--Before the Senate Committee on Finance, 88th Cong., 2d Session. 11 (1964). Though not stated in the statute, it is equally clear that utilizing the term "disposition" in the statute instead of the more restrictive word "sale," Congress intended to include some transactions that might not fall within the technical meaning of "sale."

11. The definition of "disposition" includes "[t]he parting with, alienation of, or giving up of property." Black's Law Dictionary 423 (rev. 5th ed. 1979). "Property" is everything that is "the subject of ownership, corporeal or uncorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." Id. at 1095.

12. The property sale proceed regulations that were in effect prior to enactment of Pub. L. No. 88-664 included the following criterion for determining the ownership of such property: "The terms of the recorded deed or other evidence of title . . . ." This criterion was retained and re-promulgated as a regulation applicable to the "disposition of property" exclusion following the enactment of Pub. L. No. 88-664. It is currently found in 38 C.F.R. § 3.262(k)(1)

which by virtue of 38 C.F.R. § 3.270(a) governs property ownership determinations in old-law pension, section 306 pension, and section 415 DIC cases. The current pension program's sale of property regulation, 38 C.F.R. § 3.272(e), does not contain criteria for determining the ownership of property subject to the regulation. However, it is reasonable to apply the section 3.262(k)(1) criterion to the current pension program because it is a generally accepted way of determining property ownership and the current sale of property exclusion was enacted against the background of section 3.262(k)(1). With this in mind, we now consider whether the PFD emanates from the "property" of the individual residents of Alaska as evidenced by "recorded deed or other evidence of title." Therefore we must examine the ownership of the property in question.

13. In order to determine whether the PFD revenues derived from property of individual Alaskan residents, we must examine the ownership of said property. All property is derived from the sovereign and such property as is retained by the sovereign including public lands, is the sovereign's property, separate and distinct from that of private individuals. See, 3 Tiffany Real Property § 938 et. seq. (3rd ed.) Prior to statehood, the property within the physical boundaries of the current State was titled in the name of the United States or the territorial government, or to private individuals. See, H.R. Rep. No. 624, 85th Cong., 1st Sess. 44, 45, reprinted in 1958 U.S. Code Cong. and Ad. News 2933, 2939. The Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, provided that the new State would have and retain title to property then titled in the name of the territorial government and to the acreage selected by the State from land then titled in the name of the United States. This Act also provided for passage of the mineral rights in such property to the State of Alaska together with authority to the State to lease such property. In addition, the State Constitution, in referring to the property of the State, speaks of "its" and "belonging to" the State but grants that such property is for the "maximum use" and "maximum benefit" of the "public interest" and "its people." See, Alaska Const. Art. VIII, §§ 1 and 2.

14. The Courts have recognized that the State, as sovereign, is a separate and distinct legal entity from the populace that resides in the State and that the State may own property as a legal entity subject only to the rights it grants to its residents. See, Hicklin v. Orbeck, 437 U.S. 518, 528 n.11 (1978); United States v. State of Alaska, 423 F.2d 764, 766, 767 (9th Cir. 1970); Udall v. Kalerak, 396 F.2d 746, 749 (9th Cir. 1968); Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 667 (D. Alaska 1977); Aguilar v. Kleppe, 424 F. Supp. 433, 437 (D. Alaska 1976); State v. University of Alaska, 624 P.2d 807, 815 (Sup. Ct., Alaska 1981); State v. Lewis, 559 P.2d 630, 636, 637 (Sup. Ct., Alaska 1977); and, Swindel v. Kelly, 499 P.2d 291, 296 (Sup. Ct., Alaska 1972).

15. As indicated in paragraph 4 above, the PFD represents income earned on funds derived by the State from certain transactions regarding mineral resources of the State of Alaska. This earned income is based on investments made by the Commissioner of Revenue. See, Alaska Stat. § 43.23.50. Neither the land from which the minerals are extracted nor the Permanent Fund from which the PFD is derived is subject to the generally-recognized indicia of ownership-control by the individual Alaskan residents. Rather, they are subject only to the control of the State since the State is the legal owner of said properties. In addition, the mineral transactions, the revenue generated by those transactions and the subsequent investment of the income do not constitute the wealth or estate of the individual residents of Alaska but are the assets of the State. Therefore, the PFD received by individual residents does not fall within the "disposition of property" exclusion and must be counted as income in the year received in accordance with 38 C.F.R. §§ 3.260 and 3.271.

16. In light of the conclusions reached in paragraph 15 above, further analysis of three sections of the Alaskan Permanent Fund Dividend law is required. The first provides for the payment of prior year PFD together with accrued interest thereon when PFD was not claimed on behalf of an unemancipated minor during the period of minority. See, § 43.23.014, supra. Until a person entitled under this section makes a claim for the unpaid dividends and accrued interest thereon, and payment

is made by the State of Alaska, there has been no payment within the meaning of section 503(a) and its predecessors or section 415(f)(1). Therefore, such unpaid prior year PFD is not countable income until payment is actually made and received. The unpaid prior year PFD does not constitute a part of such minor's net worth because neither the unpaid PFD nor any interest accrued thereon is available to meet the minor's needs.

17. The second section, § 43.23.045, supra, permits the State to develop a PFD payment plan for the purpose of deferring the Federal income tax effects of such payments. Any payments deferred to a subsequent time under such plan would not constitute waived income which is required to be included in computing annual income under section 503(a) and its immediate predecessor and section 415(f)(1). Only the portion of such deferred payment as is received in a given year is countable income for that year. This conclusion is consistent with the reasoning and conclusion of Op. G.C. 3-81.

18. The third section, § 43.23.075, supra, permits the State to provide for a period of 4 months, monthly payments equal to the amount of assistance lost due to PFD payments being considered income under Federal law or regulation. These substitute payments are to be made from the State's general relief program, Alaska Stat. § 47.25.120-.300, which is the State's welfare program. Therefore, any substitute payments received fall within the welfare exclusion of the income provisions in question and do not constitute income.

JOHN P. MURPHY
General Counsel

Chairman SIMPSON. That was a spirited exchange there, and I hope you will furnish what the Senator is requesting. I know you will. It is an issue that I have been familiar with, and we want to pursue that and if you will furnish him with what you have—thank you very much. We appreciate your being with us.

[The prepared statement of Hon. Frank H. Murkowski, a U.S. Senator from the State of Alaska, follows:]

PREPARED STATEMENT OF HON. FRANK H. MURKOWSKI, A U.S. SENATOR FROM THE STATE OF ALASKA

GOOD AFTERNOON, MR. CHAIRMAN. I APPRECIATE THE OPPORTUNITY TO DISCUSS S. 636, THE JUDICIAL REVIEW LEGISLATION CURRENTLY BEFORE THIS COMMITTEE. IN THE PAST YEAR, IT HAS BECOME INCREASINGLY RELEVANT TO VETERANS RECEIVING PENSION BENEFITS IN THE STATE OF ALASKA. HOWEVER, BEFORE TURNING TO THAT SPECIFIC ISSUE, I WANT TO ADDRESS THE GENERAL MERITS OF S. 636, A BILL WHICH I COSPONSORED THIS YEAR AND LAST.

SINCE ENACTMENT OF THE ECONOMY ACT OF 1933, VETERANS HAVE BEEN DENIED ACCESS TO JUDICIAL REVIEW OF DETERMINATIONS MADE BY THE VA ADMINISTRATOR WITH THE EXCEPTIONS OF INSURANCE CLAIMS, HOUSING PROGRAM MATTERS, AND CONSTITUTIONAL ISSUES. THEREFORE, VETERANS HAVE THE UNFORTUNATE STATUS OF BEING THE ONLY RECIPIENTS OF MAJOR FEDERAL BENEFITS PROGRAMS WHO ARE DENIED ACCESS TO THE COURTS AFTER ALL ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED.

THIS UNIQUE RESTRICTION WAS MADE IN THE EARLY 1900'S DUE TO A BELIEF THAT THE VA'S BENEFIT RULING SYSTEM WAS NONADVERSARIAL IN TERMS OF VETERANS' INTERESTS. IN RECENT DECADES, CASES HAVE ARISEN WHICH CALL INTO QUESTION THIS ASSUMPTION. IN ADDITION, WITH THE GROWING FISCAL RESTRAINTS FACING THE U.S. GOVERNMENT, IT HAS BEEN ARGUED THAT THE VA MAY BE FORCED TO MAKE RULINGS WHICH ADVERSELY AFFECT VETERANS THAT THEY WOULD OTHERWISE NOT MAKE.

AT THIS POINT, I WOULD LIKE TO TURN TO A DISCUSSION OF HOW THIS BILL RELATES TO A SPECIFIC BENEFIT CASE IN ALASKA.

DURING THE PAST YEAR I HAVE STRUGGLED WITH THE VETERANS ADMINISTRATION CONCERNING THE EFFECT OF ALASKA'S DIVIDEND PROGRAM ON VETERAN'S PENSION BENEFITS. I HAVE ARGUED THAT THE STATE'S PROGRAM TO RETURN TO ALASKANS, SOME OF THE PROFITS FROM SALES OF OIL LEASES SHOULD NOT BE COMPUTED AS ADDITIONAL INCOME BECAUSE OF THE SIXTH EXEMPTION UNDER TITLE 38, SECTION 503. THIS PROVISION STATES THAT "PROFIT REALIZED FROM DISPOSITION OF PERSONAL PROPERTY" WILL NOT BE CONSIDERED INCOME FOR THE PURPOSE OF COMPUTING PENSION BENEFITS. THE STATE DIVIDEND IS PAID FROM REVENUE FROM BIDS FOR THE LEASING OF PUBLIC OIL AND GAS LANDS AND FROM THE SALE OF ROYALTY OIL PRODUCED FROM THE STATE LAND. I BELIEVE THAT THIS REVENUE CONSTITUTES "PROFIT REALIZED FROM THE SALE OF PERSONAL PROPERTY", FOR IT COMES FROM LAND OWNED BY ALL ALASKANS, NOT AN INDIVIDUAL, AS IS THE CASE IN ALL OTHER OIL PRODUCING STATES.

I HAVE ALSO NOTED TO THE VA THAT THE BENEFITS IN QUESTION REPRESENT A MINISCULE PORTION OF THE VA BUDGET. HOWEVER, FOR ALASKA'S PENSION RECIPIENTS, WHOSE INCOME IS ABOUT $5000 ANNUALLY IN A STATE WHICH HAS ONE OF THE HIGHEST COSTS OF LIVING, THIS MONEY REPRESENTS THEIR LIFELINE. WE CANNOT BE INSENSITIVE TO THE VERY REAL NEEDS OF THOSE PEOPLE LIVING ON A SHOESTRING. IF THERE WAS EVER A TIME FOR A "SAFETY NET", THIS IS IT.

THERE WAS NO PRECEDENT FOR THE VA TO TAKE INTO ACCOUNT WHEN CONSIDERING THIS CASE AND THERE IS UNLIKELY TO ONE IN THE FUTURE, SINCE NO OTHER STATE IS CONSIDERING A DIVIDEND PROGRAM SUCH AS ALASKA'S. THEREFORE, I HAVE CONTENDED THAT THE VA HAS THE ADMINISTRATIVE FLEXIBILITY TO RULE THAT THE DIVIDEND MONEY QUALIFIES FOR THE SIXTH EXEMPTION. UNFORTUNATELY, THE VA HAS NOT AGREED TO ADDRESS THIS UNIQUE SITUATION IN A FULLY SATISFACTORY

MANNER. THEREFORE, I AM EXPLORING LEGISLATIVE REMEDIES WITH SENATOR STEVENS WHICH WOULD PREVENT ALASKA'S PENSION RECIPIENTS FROM BEING PENALIZED FOR RECEIVING THEIR FAIR SHARE OF THE STATE'S RESOURCE DIVIDENDS AND THE BENEFITS OF A PROGRAM DESIGNED TO AID EACH AND EVERY ALASKAN.

IN THE MEANTIME, I FEEL THAT S. 636, THE JUDICIAL REVIEW BILL, WOULD GIVE VETERANS THE LONG-TERM RIGHT TO CONTEST UNFAIR RULINGS SUCH AS THAT MADE ON THE ALASKA DIVIDEND PROGRAM. IN THIS INSTANCE AND OTHERS, IT HAS BECOME EVIDENT THAT A TRULY INDEPENDENT ARBITRATOR OF BENEFIT RULINGS IS NEEDED.

I AM NOT SUPPORTING S. 636 OUT OF A BELIEF THAT THE VA ROUTINELY FAILS TO RESOLVE CASES BEFORE IT IN A FAIR AND EVENHANDED MANNER. INSTEAD, I BELIEVE THAT VETERANS SEEKING VA BENEFITS, LIKE OTHER FEDERAL BENEFIT RECIPIENTS, SHOULD HAVE A CHANCE TO HAVE THEIR CASE HEARD BEFORE A BODY DISTINCTLY SEPERATE FROM THE VA. THE VA SHOULD NOT BE ABOVE THE LAW, AND VETERANS SHOULD NOT BE DENIED THE PROTECTION OF THE LEGAL SYSTEM.

MR. CHAIRMAN, AS YOU CAN TELL, THIS IS AN ISSUE OF GREAT IMPORTANCE TO ME. BOTH MYSELF AND THE VA HAVE INVESTED A GREAT DEAL OF TIME IN STUDYING THE ALASKA PENSION CASE. IN FACT, HAD THE VA AGREED THAT THE DIVIDEND PROGRAM QUALIFIED FOR THE SIXTH EXEMPTION, THIS TIME AND A SIGNIFICANT AMOUNT OF STAFF OPERATIVE EXPENSES COULD HAVE BEEN SAVED. NEVERTHELESS, I WANT TO EXPRESS MY SINCERE APPRECIATION FOR YOUR WILLINGNESS TO CONTINUE TO PUSH FOR THIS LEGISLATION THIS YEAR. I WISH YOU AND THE VETERANS' ORGANIZATIONS SUPPORTING S. 636 THE BEST OF LUCK IN PROCURING ITS PASSAGE IN THE HOUSE OF REPRENSENTATIVES.

Chairman **Simpson**. Now, please, Frederick Davis, dean of the University of Dayton, Ohio, representing the American Bar Association—Dean Davis.

Mr. **Davis**. Thank you, Mr. Chairman.

Chairman **Simpson**. Nice to have you with us.

Mr. **Davis**. Thank you, sir, it is a pleasure to be here as always.

Chairman **Simpson**. Do you really mean that?

Mr. **Davis**. I really do, because this is a subject dear to my heart, as you well know.

Chairman **Simpson**. I do know that. It's marvelous that people such as yourself will come before the Congress, sometimes in an adversarial situation, and continue to produce testimony for us in all our committees, usually at little cost to the Federal Treasury, and making your own arrangements and so on, and I know that all of us appreciate that.

Mr. **Davis**. Thank you, Senator.

Senator **Boschwitz**. Mr. Chairman, does Dean Davis often testify? Are you an expert on veterans' legal matters?

Chairman **Simpson**. No. I don't recall. How many times have you testified?

Mr. **Davis**. I think I have testified on this subject at least three times, Senator. Unfortunately the last time Senator Simpson had to leave because the new Veterans' Administrator was being sworn into office so I didn't have a chance to answer questions from the now chairman.

Chairman **Simpson**. The area of judicial review is a longstanding one, and there have been hearings over the last few years, and it has passed the Senate twice now—most recently in September of last year. It is a recurring issue.

Do you have some associate with you?

Mr. **Davis**. With me today is William H. Allen who is a member of the District of Columbia bar and chairman of the Section of Administrative Law of the American Bar Association.

Chairman **Simpson**. He and I were on a panel together once in Williamsburg. How are you, sir? Nice to see you; a pleasure.

Well, please go ahead.

TESTIMONY OF FREDERICK DAVIS, PAST CHAIRMAN, COMMITTEE ON VETERANS, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION AND DEAN, UNIVERSITY OF DAYTON SCHOOL OF LAW, DAYTON, OHIO, ACCOMPANIED BY WILLIAM H. ALLEN, MEMBER OF THE DISTRICT OF COLUMBIA BAR

Mr. **Davis**. Senator, as you and the committee know, the American Bar Association fully supports the basic goal of Senate bill 636, and has been on record in favor of judicial review for a long, long time, at least since 1958, but I would like to emphasize that this is not a technical problem of interest only to lawyers. It goes to the heart of our whole system.

To put one division of Government above the law is just plain wrong. It is just wrong. It offends our basic instincts, and it is not so much lawyers that are offended these days as it is the rank and file—of people who have suffered some feeling of injustice at the hands of the Veterans' Administration.

We have an organization now called Veterans for Due Process that has been organized by a number of veterans who feel very much aggrieved by the fact that there is absolutely no recourse from what they consider to be the arbitrary decisions of the Veterans' Administration. I don't think the American citizen likes to be told that he has no recourse against the bureaucracy when he feels the bureaucracy has done him injustice.

Now a lot of people say, with a good deal of logic, what is so good about courts? After all, courts are men just like everybody else. What is so magical about judges? What is it that makes you think that only judges are going to do justice? Can't the Veterans' Administration, or, more precisely, the Board of Veterans' Appeals, do just as good a job?

I think our answer to that question has always been that there is nothing magical about judges and no one would question the integrity of the members of the Board of Veterans' Appeals. What is at issue here is our whole system of checks and balances. That is the heart of the American system. No matter how good you are and no matter how talented you are, you ought really to have to answer to somebody, some time, as to how you are exercising your authority, and that is basically what the American Bar Association is concerned about. It is also what many of the veterans who have formed the organization "Veterans for Due Process" are concerned about.

The VA distributes over $13 billion worth of benefits every year, and it answers to nobody, absolutely nobody, as to the accuracy or consistency of its eligibility decisions. Experience indicates that the VA administers and interprets these laws as it thinks fit, and not as Congress has written them.

Now Senator Murkowski's experience I think is not untypical. We have other indications of how the VA has taken a look at a statute and said, "Well, we know what the statute says but we think we ought to impose this or that additional condition because it is good."

One minor example is provided by the Veterans' Benefits Act of 1974. It extended veterans' eligibility for certain educational benefits for a period of 9 months. The statute said nothing at all about the veteran having to be within a degree program at the time, but the VA, thinking it would be a good idea to limit the number of people who would be making claims under that eligibility extension, arbitrarily said that to be eligible a veteran had to be in a degree program at the time the extension was sought. There was nothing in the statute that imposed that condition, but that condition was in fact imposed, and no veteran aggrieved by that condition could obtain judicial review.

We have records of other similar experiences. For example, widows have claimed benefits and the VA has said they are not eligible because divorced. In many such situations there was no legal divorce, and yet such persons have had to go for as long as 9 years to establish the fact of no dissolution. In one case the widow had to obtain a declaratory judgment from the State of Tennessee that she was not in fact divorced before the VA would begin to pay those benefits.

We could give you other examples. Unfortunately, however, the foregoing are not at all untypical of what happens when bureaucracies are not subject to judicial review. Experience with any bureaucracy reveals that however well meaning it may be, bureaucracy, if unchecked, tends to think that it knows better than the Congress or the general assembly of a State, what is good for the people, and will disregard clear legislative language which it concludes is inappropriate.

Our experience with closed systems in other areas has proved to us that they don't work. We have had some experience with the FBI. We have had some experience with the CIA. For one reason or another, many of the activities of these organizations have been held not subject to judicial review. And we have learned that many of those activities have been contrary, not only to congressional expectations, but to the spirit of the Constitution.

The three things that you look for in governmental action are accuracy, acceptability, and efficiency. We have indications that the Board of Veterans' Appeals' decisions are not accurate. We have indications that they are not acceptable because there are many veterans who are very much aggrieved by them. As far as efficiency is concerned, we don't know because we have no window, and hence no way of appraising how effective the Board of Veterans' Appeals is without judicial review.

I see that my time is up. That red light is on. I am very sensitive to such things. Let me simply say that with respect to the fee limitations, the American Bar Association is also very much opposed to those fee limitations, and we believe that they effectively bar the veteran from having the option of representation. We think a chance for legal representation that should be given.

There is not a lot of money to be made. There are no hordes of lawyers out there waiting to make a killing representing veterans. We haven't had that experience with social security claimants. We don't think we will have that experience with veterans.

We do think, however, that the veteran should be able, if he wishes, to retain an attorney to represent him, and, Mr. Chairman, that is the position of the American Bar Association. I would be glad to attempt to answer any questions that you have.

Chairman SIMPSON. Thank you very much, Dean. Your statement, of course, fully supports the basic goals of S. 636, and from the rest of your testimony, and I think it is plain enough that I think I certainly concur as to what the problem is.

The solution may be where we need to address ourselves, and in light of your longstanding experience in this area and with the history of the legislation—indeed you have a considerable expertise—I would be particularly interested in your comments on the scope of review provision contained in S. 636.

Do you see any problems in judicial construction of the review standard that we have drafted here? How does it compare to the substantial evidence definition or the "arbitrary and capricious" test that were contained in earlier versions of this legislation in terms of accomplishing the committee's stated goals of preserving the positive aspects of the present system and still building in this additional level of judicial review?

Mr. DAVIS. Let me start by saying, Senator, that I think the formula is good. I think it is designed, to reduce the number of frivolous actions because when you come to developing a formula for judicial review there is no really reliable formula. Courts must interpret words and deal with phrases. The best that you can do with legislation is to give the court a signal as to what your expectations are with respect to the scope of the review. I think this legislation clearly gives a signal that you expect that review to be limited. You expect that review not to be as extensive as, for example, review of National Labor Relations Board decisions or even decisions of the Social Security Administration.

You have deliberately avoided use of the so-called substantial evidence test which is a test appropriate only to situations where there is a discrete factual dispute. The language used in Senate bill 636—although one might possibly think of better phrases, and that is what professors are paid to do I suppose—be critical—very clearly says that a decision will be remanded because of a factual error only if it is utterly without a rational basis. This is an extremely exacting test. It reduces the reviewability to a minimum. I think it is admirably designed and worded to achieve that purpose.

Some years ago when Mr. Allen was chairman of the Judicial Review Committee of the Administrative Conference of the United States we did a study of this same subject, and we came up with a proposal which had an option. We had language similar to the language which allows review of a decision which is in utter disregard of the facts or utterly without any rational basis. We also provided an alternative under which one could narrow the scope of review even more narrow it even further by eliminating the option to reject decisions which are without any rational or factual basis. Such decisions would then have to be arbitrary and capricious, an even narrower test. So with that little footnote I simply say that I think that the scope of review is admirably narrow under Senate bill 636.

Chairman SIMPSON. You also referred to the issue of attorneys' fees, and of course in the legislation we say, under certain circumstances, not in excess of $750 shall be paid to the attorney by the claimant.

You don't feel there would be—I can't remember what your phrase was—a large group of attorneys waiting there to assist in that system, something like that, but you are comfortable with that?

Mr. DAVIS. I haven't analyzed this as carefully as I have the judicial review provision, Senator, but it appears to me to be based upon the system that has been developed with respect to social security claims, and that system has not, to my knowledge, been the subject of any significant abuse.

Chairman SIMPSON. The VA testimony suggests that there is no scope of review provision which permitting factual review which would avoid the much discussed difficulties of distinguishing between question of facts and question of law in the VA context. This is something that I came across in my first months here—whether we use the APA substantial evidence test or this bill's utterly without rational basis test or simply a limitation to questions of law.

The argument is that this same cumbersome determination will have to be made somewhere along the line in proceeding.

Would you please respond briefly to that?

Mr. **Davis**. I go back to what I said earlier, that all we can do as legislators is to give signals, and don't think it is possible to maintain a workable distinction between questions of law and questions of fact. It can be a question of law whether a decision is so totally inconsistent with the facts as not to be a decision at all. We can play with words and semantics, but it all comes down to a question of degree.

I think the important thing is to give the courts a signal as to the intensity of the review which they are expected to exercise. This bill clearly gives that signal, and, by rejecting the substantial evidence test, it clearly rejects what Mr. Justice Frankfurter restated in *Universal Camera,* and has always been a matter of intense debate: To what extent should judges be required to analyze and review a whole record to make sure that the factual decision is correct. That is not the test which this legislation establishes.

Chairman **Simpson**. I have just one final question. Concerning the argument that review of any kind is going to impose too great a burden on Federal courts and too little benefit to the claimant—assuming that might be true—what would be the ABA's position on establishment of a specialized Court of Veterans' Appeals, an article 1 court something like the Tax Court?

Mr. **Davis**. That is a question that I hadn't thought about, Senator, in connection with these hearings, but I recall that the American Bar Association took the position that it was opposed to specialized courts when this issue was ventilated the first time, about 10 years ago. I think that is correct.

My personal position is that I would be opposed to the creation of a specialized court. I just think it is inconsistent with our expectations that the judiciary be composed of persons with broad experience, commonsense, and the capacity to deal with a broad spectrum of problems.

Chairman **Simpson**. Thank you very much. Do you have any questions?

Senator **Boschwitz**. Not really, Mr. Chairman, except have we looked at our veterans and did we find that our office had received very many complaints about the lack of being able to go on after the finding of the VA?

I see this piece of legislation with many of my colleagues on here. I presume that there must be a feeling that indeed the veterans are not receiving adequate adjudication within the VA system itself.

Chairman **Simpson**. Well, the veterans' organizations have always been most active and most extraordinarily helpful to veterans and quite the advocate of the veteran, and I don't know that it is so much any great inefficiency. I think it is a question simply of judicial review. It is not a question of——

Senator **Boschwitz**. Whether or not it is needed?

Chairman **Simpson**. No. It is a question of if you have judicial review in every other system of the entitlements type of activity and benefit system, should not it be present here? And even though the veterans' organizations do yeoman work in this area, that is one thing.

Senator **Boschwitz**. What is it going to cost?

Chairman **Simpson**. Oh, about $20 million now is intended for the Board of Veterans' Appeals and apparently this would take another $7 million, something like that.

Mr. **Murphy**. Senator, although it is a difficult measure to cost out, I think our present estimates would be for a VA cost of approximately nine.

Last year I believe the Department of Justice—I will check this for the record—but I think the Department of Justice estimated costs on the judiciary was about $3.2 million in addition.

Chairman **Simpson**. Thank you very much.

[Subsequently, the Veterans' Administration submitted the following information:]

In its report on S. 349 in the 97th Congress, the Department of Justice (DOJ) noted that 1978 estimates of the cost of judicial review of Veterans' Administration decisions would impose personnel and support costs of $3,032,000 on the Federal judiciary. DOJ estimated that the current cost of such personnel and support would be much greater.

Mr. **Davis**. I would point out in that respect that my testimony details some of those projections and shows where I believe that they are exaggerated. It is not the number of cases actually processed—only the number filed.

Chairman **Simpson**. Thank you very much. Thank you, and good to see you again.

Mr. **Allen**. It's good to see you, Senator.

[The prepared statement of Frederick Davis, dean, University of Dayton School of Law, and past chairman, Committee on Veterans, Section of Administrative Law, American Bar Association, and the ABA's response to written questions submitted by Hon. Alan Cranston, ranking minority member of the Senate Committee on Veterans' Affairs, follows:]

PREPARED STATEMENT OF FREDERICK DAVIS, DEAN, UNIVERSITY OF DAYTON SCHOOL OF LAW, AND PAST CHAIRMAN, COMMITTEE ON VETERANS, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to present the views of the American Bar Association on S.636. I am Frederick Davis, Dean of the University of Dayton School of Law, Past Chairman and current member of the American Bar Association's Committee on Veterans of the Section of Administrative Law, and the author of a much cited law review article detailing many of the problems which this bill is designed to correct. F. Davis, Veterans' Benefits, Judical Review, and the Constitutional Problems of "Positive" Government, 39 Indiana L.J. 183 (1964).

The American Bar Association fully supports the basic goal of S.636 which would remove the existing absolute and unconditional preclusion of judicial review of allegedly unlawful decisions of the Veterans Administration.

In 1958 the House of Delegates adopted a resolution expressing its support of legislation which would permit judicial review of decisions of the Veterans Administration (Appendix C). In 1975 the House of Delegates reaffirmed that position (Appendix D).

§211(a) of Title 38 of the United States Code presently provides that decisions of the Veterans Administration under any benefits program "...shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

The effect of this statutory provision is to put the Veterans Administration above the law in the administration of its benefits progtams and in the distribution of benefits authorized by Congress. Because the American Bar Association is committed to the proposition that no one should be above the law, it opposes this restriction. S.636 would change this and subject the decisions of the Veterans Administration to judicial review.

The only other civilized country which has ever attempted so completely to insulate a bureaucracy from judicial control is England. Although now a discredited practice, for some years, Parliamentary draftsmen in attempting to place administrative regulations above the law, were able to persuade Parliament to insert in enabling statutes delegating power to administrative agencies the following phrase "...(A)ll regulations made under this Act shall have effect as if enacted in this Act." Since, in England, Parliament is sovereign, English judges were compelled to give those words literal effect, even though they found them distasteful.

A storm of protest led by leading English jurists (e.g., C.K. Allen and Lord Hewart) produced the winds of change which have forced Parliament to abandon such practices. These odious statutory phrases which had put the actions of the bureaucracy above any judicial review or control, and which had been called, not inappropriately, "Henry VIII clauses," are no longer found in England.

Paradoxically, in the United States, §211(a), which S.636 would repeal and which, in Henry VIII style, puts the Administration above the law, still remains in force. How did such a relic from an era of bureaucratic tyranny get into the United States Code, and how has it survived?

This "no review" clause crept into the law as a provision of the so-called "Economy Act" of 1933, a part of which was designed to give the Veterans Administration unrestricted power in the administration of its programs. This was an era marked by what some have called "economic fascism," and which was dominated by the idea that economic stability and progress could be achieved by assigning unrestricted power to economic and administrative groups. Just as absolute control over production and distribution enterprises was to be governed by codes adopted by private guilds under the National Recovery Act (NRA), so, also, the Veterans Administration was to have absolute control and unrestricted discretion in the distribution of benefits. Although the philosophy of that era was abruptly rejected by the Supreme Court when it held the NRA unconstitutional in the now famous case of A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the no-review provision of the Veterans' Benefits Act (now 38 U.S.C. §211(a)) survives as a monument to the discredited economic philosophy of that era.

It has survived, we believe, in part because the national bureaucracies of a number of veterans organizations have an unrealistic fear that a repeal would weaken their capacities by denying them the virtual monopoly which they now enjoy in counselling and advising veterans with service-connected claims.

Not only would S.636 remove this curious anomaly from the American system of justice, but it also would reverse what the

American Bar Association considers an ominous trend. Although the ABA adopted a resolution in 1958 supporting legislation which would make VA decisions subject to judicial review, in 1970 a last minute amendment to a Veterans Administration appropriations bill further narrowed the reviewability of VA decisions. This change was made without notice or hearing from those persons adversely affected by the amendment. The amendment was clearly prompted by the opinion of the United States Court of Appeals for the District of Columbia Circuit in Tracy v. Gleason, 379 F.2d 469 (D.C. Cir.1967), which had construed the no-review clause as applying only to initial claims for benefits. In view of the regressive nature of this 1970 amendment the ABA was moved to reaffirm its position by adopting the 1975 resolution, once again expressing its support for legislation which would subject decisions of the VA to some judicial review.

The American Bar Association believes that there is no place in American government for a closed system. The Freedom of Information Act and the Sunshine (Open Meetings) Law represent significant advances in assuring the American people that their governmental officials are complying with the law. To make the VA answerable in the courts to a legitimately based assertion of unlawful action on the part of the VA would be a similar advance.

Although most judges who have faced challenges to VA benefits decisions have given a literal effect to the no-review clause (see e.g., Hahn v. Gray, 203 F.2d 625, 626 (D.C. Cir.1953) "It was the purpose of that statute to remove the possibility of judicial relief even if the action of the Administrator was arbitrary and capricious..."), recent opinions have hinted that in a proper case involving an egregious interference with a constitutional right, that language might be disregarded. See Johnson v. Robison, 415 U.S. 361, 368 (1974).

It is obvious, however, that our courts are inclined to avoid this constitutional issue if at all possible, and that a ruling on that issue would involve a direct conflict between what Congress has explicitly declared and what the courts believe to be a constitutional limitation. Approval of S.636 or similar legislation would avoid such an unnecessary confrontation by making it clear that it was never the intention of Congress to put the VA above the law.

We note that a provision in S.636 patterned after §106(2) of S.349 passed by the Senate in 1982, effectively deals with one of the most frequently expressed fears of those who are skeptical about the value of judicial review -- namely, the fear that judicial decisions will destroy VA flexibility by establishing precedents which the VA is not free to disregard. That provision makes it clear that the VA is free to allow a claim even though its earlier disallowance is upheld on a judicial appeal.

One writer has predicted a dire impact upon the dockets of the federal courts if review of VA decisions is allowed. A

Deputy Assistant Attorney General, appearing before the Senate Veterans' Affairs Committee in the 95th Congress, 1st Session, in 1977, prophesied 4,600 appeals if the VA decision-making process were open to judicial review -- a total increase in cases filed in the federal district courts of 3.4%. He based his estimate on appeals from Social Security decisions. The prediction is unrealistic:

1. The number of filings rarely is an accurate measure of drain. Many cases routinely are remanded, or withdrawn or settled for other reasons. Cases decided on the merits may be decided summarily, without trial and with lesser impact upon judicial manpower. J. Mashaw et al., Social Security Hearings and Appeals 127 (1978).

2. VA benefits decisions are not forged in the same trial-type crucible as Social Security benefits decisions, thus providing fewer technical or procedural grounds for judicial appeal. Social Security benefits decisions are subject to the trial-type procedures of 5 U.S.C. §§556 and 557. Under S 636, VA benefits decisions are specifically exempted.

3. Of the 23,000 claims rejected by the Board of Veterans Appeals, 20,000 are rejections of routine appeals made without a hearing. If the claimant did not think his case important enough to seek a hearing before the VA board, it would not be likely he would retain counsel and go to court.

4. The typical VA-rejected claim does not compare in severity to the typical Social Security-rejected claim. In

Social Security, the claimant's disability either prevents him from engaging in a gainful occupation or it does not -- he receives disability benefits or he does not. The vast majority of VA-rejected claims involve upgrading of previously awarded percentage disability ratings. The veteran either gets a little more money or he continues to receive the amount he has been receiving. The incentive to litigate in the courts is inevitably less.

The American Bar Association also has been on record since 1977 as opposing statutory provisions concerning administrative action which place arbitrary limitations on fees for legal services to be rendered before administrative agencies.

Specifically on point, in August, 1977, the Association's House of Delegates adopted a resolution urging enactment of legislation which would repeal the limit of $10.00 on the fee which an attorney may charge for representing a client before the Veterans Administration and provide reasonable fees for attorneys representing clients before the VA. (See Appendix A of this statement for a copy of the resolution.)

The VA administers a large and complicated system of benefits for veterans. (See Appendix B of this statement.) The system operates primarily through the mode of individual application and informal administrative adjudication of disputed claims, without judicial review.

The ABA believes that a person should be permitted to retain an attorney to present his or her VA case if he or she so desires. It is beyond dispute that the current $10.00 limitation effectively prohibits a veteran from retaining an attorney. The ABA believes that the availability of attorneys can play an important role in highlighting areas of vagueness and excessive discretion and in promoting effective presentation of complex claims, e.g., the "service-connection" cases.

A liberalization of the fee restriction is clearly crucial to ensure the availability of the attorneys needed to implement the judicial review section of S.636. If attorneys cannot afford to take VA cases because of the $10.00 fee limitation, providing judicial review of VA decisions could become a nullity. Lay service organization representatives are prohibited from practicing in district court, and federal practice and procedures are far too complex for most lay veterans to effectively represent themselves.

Again, in these days when the "right to counsel" is, under many circumstances, recognized as a constitutional right, it is interesting to note how this anomaly crept into the United States Code.

A part of the answer can be found in House Report No.471 from the Committee on Interstate and Foreign Commerce, 65th Cong., 2d Session, cited in Hines v. Lowrey, 305 U.S. 85, 88 (1938). A letter from the Secretary of the Treasury included in that Report includes the following language:

> The evils of the situation are pressing. Unscrupulous attorneys and claim agents are circularizing prospective claimants. ...The heartlessness and rapacity of these persons knows no bounds. In some instances their break-neck rush for employment has led them to the length of crucifying the wives and mothers of those in the service by false announcements that their husbands or sons have already fallen, and in almost all cases they are seeking to mulch the unwary out of hundreds of dollars for services that are entirely unnecessary or would be amply remunerated by a nominal fee.

See also the Congressional Record, Vol. 56, Pt. 5, 5220-5226.

However accurate such observations may have been at the time they were made -- and there is reason to question that accuracy -- it is impossible for such abuses to occur today. In the first place, as experience under the Social Security disability system indicates, there is no significant opportunity for generating huge fees from representing social security claimants, and S.636 imposes similar limitations and safeguards in connection with representation of veterans. Moreover, the legal profession is more effectively regulated today than at the time the Secretary of the Treasury made his remarks.

The notion that there is a horde of hungry lawyers avidly awaiting the repeal of the statutory limitations on fees for representing claimants against the Veterans Administration, so that such lawyers can cash in on a lucrative law business, is simply not in accordance with the facts.

S.636 does not require veterans to retain attorneys. It simply gives them freedom of choice. Specifically, claimants would be able to represent themselves, have a member of a service organization represent them, or hire an attorney.

Some opponents of the bill argue that attorneys would take advantage of veterans. To the contrary, in the complex cases, particularly the "service-connection" cases, an attorney who is trained and skilled in gathering and presenting inconclusive and complex evidence to an administrative agency, and building a record for possible appeal, may be the veterans' greatest asset. Moreover, every state has adopted a stringent code of professional conduct, similar to the ABA's Code of Professional Responsibility, which regulates the attorney in virtually every area of practice.

In conclusion let me say that the American Bar Association fully supports the basic principles of S.636 which would remove the prohibitions against judicial review of decisions of the Veterans Administration, and which would reaffirm every American's right to counsel by removing the existing $10.00 limitation on attorneys' fees.

On behalf of the American Bar Association I want to thank you for the opportunity to testify on this very important piece of legislation.

I would be glad to attempt to answer any questions you may have.

Appendix A

Resolution of the
House of Delegates of the
American Bar Association, adopted August, 1977

Resolved, that the American Bar Association recommends that the Congress adopt legislation:

1. Repealing 38 U.S.C. 3404(c)(2), which limits the fee which an attorney may charge for representing a client before the Veterans Administration to $10.00;
2. Providing reasonable fees for attorneys who represent clients before the Veterans Administration, based on the following considerations:
   - (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
   - (b) The likelihood, if apparent to the client, that the acceptance of the particular employment, would preclude other employment by the lawyer.
   - (c) The fee customarily charged in the locality for similar legal services.
   - (d) The amount involved and the results obtained.
   - (e) The time limitations imposed by the client or by the circumstances.
   - (f) The nature and length of the professional relationship with the client.
   - (g) The experience, reputation, and ability of the lawyer or lawyers performing the services.
3. Providing that the client and the attorney shall determine the attorneys fee, subject to approval by the Administratior of the Veterans Administration and to review by the Federal district in which the claim is processed or in the Federal district court in Washington, D.C.
4. Nothing in this resolution shall be deemed to ammend or modify Resolution #106(G), adopted by the House of Delegates in August, 1976.

Appendix B

EXERPT FROM THE
AMERICAN BAR ASSOCIATION
REPORT ON THE VETERANS ADMINISTRATION,
FEBRUARY, 1976

A pervasive problem in the Veterans Administation which attorneys could effectively monitor is the manner in which it determines who will and will not receive benefits. The problem is most critical in the exercise of the VA's discretion as to whether those with less than honorable discharges will receive veterans benefits. From 1964 to 1972, more than 175,000 servicemen were dismissed from the service with less than honorable discharges. Of the various discharges, bad conduct and dishonorable discharges were rare, accounting for no more than 1% of the total discharges. ("Types of Discharges Issued to Enlisted Personnel by Fiscal Year 1950-1972," Office of Assistant Secretary of Defense [Manpower and Reserve Affairs], Aug. 31, 1972.) Such discharges are imposed only by general or special courts-martial. The middle echelon of discharges is the undesirable discharge. Like the honorable and general discharges, it is administrative, but like bad conduct and dishonorable discharges, it may carry heavy penalties in civilian life. Undesirable discharges are given most often for drug use, homosexual acts, conviction by Civilian authorities, and offenses involving "moral turpitude."

Contrary to widespread belief, federal law does not bar the Veterans Administration from dispensing benefits to veterans with less than honorable discharges. The VA is in a position, for example, to extend educational assistance to veterans who, because of a lack of education or training, are perpetually unemployed. But because of the way the VA has applied the law, and the way it interprets its social functions, the agency has not made such assistance available.

Benefits are available by federal law to all veterans who receive discharges "under conditions other than dishonorable." Anyone who receives an honorable or general discharge is unambiguously entitled to benefits. Anyone who receives a dishonorable discharge is unambiguously excluded from benefits, as is someone issued a bad conduct discharge by a general court-martial. Undesirable discharges and bad conduct discharges issued by special courts-martial constitute the "gray area." If a veteran has one of these -- and more than six out of every seven Vietnam veterans with less than honorable discharges do (38 USC 101 (2) -- the VA makes an independent determination of whether or not it was issued under dishonorable conditions. The agency has adopted its own rules on this question. A discharge issued for mutiny, spying, or homosexual acts is automatically considered to be under dishonorable conditions. In addition to the specific categories of discharges that the VA has determined to be under dishonorable conditions, the agency has adopted two rather broad and subjective criteria in its eligibility decisions. A discharge is considered to have been issued under dishonorable conditions if it stemmed from an offense involving "moral turpitude" or was the result of "persistent and willful misconduct." (Starr, The Discarded Army, at pp. 176-177). The determination is made on a case-by-case basis without the assistance of any published and definitive guidelines. The only guideline would appear to be an unwritten presumption that the service imposes less than honorable discharges only for acts of moral turpitude or persistent and willful misconduct, because the VA indicates that 93% of the veterans with less than honorable discharges who applied for educational benefits were denied them. (Letter from Mr. Stratton Appleman, Assistant Director Public Information Office, Veterans Administration, to Raymond Bonner, dated January 18, 1973.)

Ordinarily, the VA keeps no statistical records on benefit applications from vetarans with undesirable and bad conduct discharges. A study of a five month period in 1972, however, noted that only 1,305 applications for educational benefits were received from men with less than honorable discharges. Of these, 91 were approved. During this same period, more than 4,000 veterans with less than honorable discharges applied for unemployment compensation (although the benefits are dispensed by the Labor Department, eligibility decisions are made by the VA). Of the 4,000 men who applied, 3,400 were found ineligible. Ninety-seven of the cases involved veterans with drug-related discharges; six of these were approved. (Starr, The Discarded Army, at p. 179).

The per se rules which the VA has adopted with respect to servicemen with less than honorable discharges appear to be a violation of congressional intent. Some argue that service organizations can adequately protect and represent those allegedly unfairly denied benefits because of less than honorable discharges. It would appear from the statistics herein mentioned, however, that the American Legion, the VFW and other service organizations have not been particularly effective in prosecuting such claims. This is an area ripe for the watchful eye of the attorney in assuring that congressional intent is implemented and those entitled to benefits are treated equally.

The VA's disability program is another area in which the attorney could be quite useful, since the considerable discretion involved in processing disability claims makes the program susceptible to unequal treatment among veterans. For example, a regulation provides that a veteran can be classified as totally disabled if he is "unemployable" and he achieves a certain percentage rating under a rating schedule (38 C.F.C. 4. 16017). The concept of "unemployability," however, as described in the regulations, is rather imprecise, sometimes resulting in a lack of uniformity in practical application. (The regulations define unemployability as "unable to secure or follow a substantial gainful occupation." 38 C.F.R. 4. 16.)

Similarly, in order for the veteran to participate in the disability compensation program, he must have at least a 60% disability on the rating schedule, or two disabilities totalling 70% with one equal to 40% (38 C.F.R. 4. 16). A determination of disability under the rating schedule requires many subjective determinations including the degree of social impairment due to psycho-neurotic disorders. Even in the disability cases where medical disputes predominate, subjective determinations must be made in arriving at the percentage of disability pursuant to the rating schedule, and without the assistance of a trained attorney a veteran may not be able to effectively guard against unequal treatment.

Appendix C

RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, ADOPTED 1958 ANNUAL MEETING

Be It Resolved, That the American Bar Association supports the enactment of H.R. 272, 85th Congress, First Session, a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs, with a recommended amendment which would subsitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorize the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

L

Appendix D

RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAL BAR ASSOCIATION, ADOPTED AUGUST, 1975

Be It Resolved, That the American Bar Association reaffirms its endorsement of the principle of judicial review of the decisions of the Administrator of Veterans Affairs; and

Be If Futher Resolved, That the President of the Association or his designee is hereby authorized publicly to urge enactment of this proposal of law.

RESPONSE OF THE AMERICAN BAR ASSOCIATION TO WRITTEN QUESTIONS SUBMITTED BY HON. ALAN CRANSTON, RANKING MINORITY MEMBER OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Question 1.A. From the perspective of your general administrative law experience and your specific interest in the VA, please comment on the statement on page 3 of the VA's statement that "the informal, nonadversary nature of our claim procedure ... provides greater protection to claimants than is available in comparable proceedings at other agencies."

B. What impact do you believe that providing for judicial review and codifying the agency's administrative procedures as is proposed in S. 636 would have on current VA claims procedures?

Answer 1.A. If "informal and non-adversary procedures" provide greater protection to persons affected by administrative agencies, one would have to write off a full century of public law experience. Everyone agrees that formal procedures tend to enhance accuracy, although there is an understandable disagreement over the marginal utility of formal procedures. Informal procedures permit the deciding authority, among other things, to rely on circumstances and data the identity of which need not be disclosed to the parties affected. It is hard for me to see how such procedures "protect" claimants, however desirable such procedures may be in promoting efficiency.

Answer 1.B. The only effect on the administrative procedures of the Veterans' Administration which would result from judicial review and the codification of the agency's present procedures would be indirect. The codification, and the exposure to judicial review, would have the effect, again, indirectly, of improving those procedures and making them fairer in the few cases in which miscarriages would be judicially detected.

Question 2.A. Please comment on the statement on page 3 of the VA's testimony that "[t]he review provided by the Board [of Veterans' Appeals] is independent and the VA has scrupulously maintained this independence."

B. Please compare briefly the independence of BVA members from the Administrator and the rest of the VA as compared to the attributes of independence that attach to federal judges.

Answer 2.A. The statement to the effect that review by the Board of Veterans' Appeals is independent is contradicted by the facts. It is well known that the doctors and lawyers appointed to the Board of Veterans' Appeals are made from lists internally generated and not, as it the case with Administrative Law judges, by independently and objectively formed panels. During our study of the Veterans' Administration procedures undertaken for the Administrative Conference of the United States, we encountered a number of incidents in which it was alleged that there were VA interferences with the decisional process of panels of the Board of Veterans' Appeals.

Answer 2.B. The BVA members work within the same building as the administrator of the Veterans' Administration, and do not enjoy the same job tenure protection that is enjoyed by federal judges. Obviously, one cannot expect the same independence from members of the Board of Veterans' Appeals as one can expect from federal judges.

Question 3. On page 3 of the VA's testimony, reference is made to "a centralized body for determination of veterans' benefit claims" and the statement is made that "the BVA offers a more consistent and systematic approach to claim adjudication ...." From your experience, is the BVA "a centralized body" that offers a "consistent and systematic approach" to claims adjudication?

Answer 3. Our study for the Administrative Conference of the United States showed that BVA panel decisions are typically not couched in forms which make them useful as precedents, nor are they in fact used as precedents. These observations belie the assertion that "the BVA offers a more consistent and systematic approach to claims adjudication...."

Question 4. Please comment on the statement on page 4 of the VA's testimony that "there is nothing to indicate that the current preclusion of judicial review results in injustice."

Answer 4. Again, our study for the Administrative Conference of the United States revealed a series of examples of unjust decisions by the Veterans' Administration, including a number of decisions which facially contradicted Congressional expectations. Philip Cushman, Esq., the President of Veterans for Due Process, has also a long list of documented instances of unjust decisions by the Veterans' Administration which are presently beyond judicial correction.

Question 5. Please comment on the assertion, on page 5 of the VA's testimony, that statutes "precluding judicial review of administrative action ... are relatively common throughout the Federal Government" and its applicability in the area of individual benefits adjudication.

Answer 5. Although there were one or two instances, in the past, of federal statutory provisions foreclosing judicial review (decisions of the old Foreign Claims Commission, and decisions of the now defunct Renegotiation Board) the only surviving instance of this brutal preclusion of judicial review is provided by the Federal Employees' Compensation Act, 5 U.S.C. Section 8128. The assertion, made on page five of the VA's testimony, is simply not supported by the facts.

Question 6. On pages 7 and 8 of the VA's testimony, there is discussion regarding the experience of judicial review of Social Security Administration decisions.

A. In what, if any, ways do you believe that the system of judicial review that would result if S. 636 were enacted would be significantly different from the system of judicial review that exists for SSA claims?

B. To the extent that there are differences between the SSA judicial review system and that proposed for the VA by S. 636, do you believe that some of the problems in the SSA system identified by commentators would be avoided?

Answer 6.A. As I mentioned in my testimony, the system of judicial review that would result from the adoption of S.636 would be substantially narrower and far less intensive than the judicial review that presently exists for Social Security Administration claims. The reason for this is that the decisions of the SSA are reviewed with the additional intensity which the Administrative Procedure Act provides for decisions which are required to be made on the record after a hearing, and which includes compliance with the "substantial evidence in the light of the whole record" test. On the other hand, S.636 would subject VA decisions to review only in terms of the so-called "arbitrary and capricious" test, although the bill also provides for a rejection of a decision which is utterly without factual support.

Answer 6.B. As I mentioned in my testimony, I believe S.636 is admirably drafted in order to avoid some of the problems that have arisen under the SSA system.

Question 7. Beginning on page 9, the VA's testimony makes several references to the standard for judicial review of VA decisions on factual issues that is included in S. 636 as the "radional basis test". Taking into account the wording and the legislative history of the provision in S. 636, do you consider the scope-of-review standard proposed in S. 636 different from the "rational basis test"? If so, in what respects?

[If yes] Do you believe that a federal court would be able to appreciate this difference and proceed accordingly?

Answer 7. I have difficulty with the VA's testimony beginning on page nine, and I think it is because that testimony proceeds on faulty assumptions. In the first place, even under the most liberal review option established by the Federal Administrative Procedure Act (the substantial evidence test) a court is never free to make de novo (see page nine of the VA testimony) findings of fact. Neither can I agree with Mr. Murphy's assertion that the so-called "rational basis" test would be considered to be an invitation for more intensive review of factual matters. I am unaware of any formula of review based upon a so-called "rational basis" test. I think the signal given in the scope of review section for S.636 is quite clear and that it means, and would be interpreted by all federal judges as meaning, that only outrageous or patently unsupported decisions could be set aside on that basis.

As a purely personal matter I would favor eliminating, in its entirety, sub-paragraph D of Section 4026 (a)(1) and appropriate provisions of paragraph (a)(2). I think that a decision manifestly unsupported by the facts can be considered to be arbitrary and capricious, etc., a review formula which is sufficiently narrow to meet the misgivings of those worried that the Courts will engage in wholesale revision of VA decisions via factual review.

Question 8.A. Please comment on the arguments that the VA made on pages 12-13 of its testimony that, to support its contention that no matter how broadly or restrictively the fact-issue scope-of-review standard would be drawn, there would be no change in the number of reviews sought of BVA decisions that should be expected.

B. To what extent do you believe attorneys, in deciding whether to take a case to court, would take into account whether they will win or lose?

Answer 8.A. I believe the VA is wrong in its assumption that the narrowness or broadness of the review standard would have no effect on the number of cases appealed. It is true, and obvious, that an attorney would draft his pleading or petition to conform with the requirements of the statute, but that does not mean that attorneys would be so unrealistic as to attempt to overturn decisions clearly within the legitimate discretion of the Veterans' Administration. Of course, this is speculative, but I believe that the number of challenges made to Selective Service decisions during World War II, when the scope of review was extremely narrow, was infinitesimal.

Answer 8.B. I doubt that very many attorneys would seek to appeal a decision of the Veterans' Administration when it was quite clear that they were going to lose, especially in view of the compensation formula established by S.636.

Chairman SIMPSON. Next, please, on the construction issue, William Sullivan, Associate Deputy Administrator for Logistics, accompanied by Dr. William J. Jacoby, Jr., Deputy Chief Medical Director, and William Saimond, Associate Deputy Director for Construction of the VA.

Senator BOSCHWITZ [presiding]. Do you have prepared testimony?

Mr. SULLIVAN. Yes, I do, Senator Boschwitz.

TESTIMONY OF WILLIAM F. SULLIVAN, ASSOCIATE DEPUTY ADMINISTRATOR FOR LOGISTICS, VETERANS' ADMINISTRATION, ACCOMPANIED BY DR. WILLIAM J. JACOBY, JR., DEPUTY CHIEF MEDICAL DIRECTOR; WILLIAM SALMOND, ASSISTANT DEPUTY ADMINISTRATOR FOR CONSTRUCTION; ROY McCRACKEN, DIRECTOR, DEPARTMENT OF MEDICINE AND SURGERY'S FACILITY, ENGINEERING, PLANNING AND CONSTRUCTION OFFICE; GERALD E. NEUMANN, DIRECTOR, PROGRAM CONTROL AND ANALYSIS STAFF; DR. MURRAY G. MITTS, DIRECTOR, PROGRAM ANALYSIS AND DEVELOPMENT; AND JOHN P. MURPHY, GENERAL COUNSEL

Mr. SULLIVAN. Mr. Chairman, we are pleased to appear before you today to discuss the VA's medical facility construction program, our fiscal year 1984 budget authorization requests, and the VA's long-range planning process for medical facility construction.

To assist me in responding to your questions I have with me on my immediate left, Dr. Jacoby, Deputy Chief Medical Director; on my far left, Roy McCracken, the Director of the Department of Medicine and Surgery's Facility, Engineering, Planning and Construction Office; on my immediate right, Bill Salmond who is the head of the Office of Construction; on my far right, John Murphy, our general counsel.

As you know, the VA hospital system includes 172 medical centers located throughout the United States which offer a comprehensive range of health services to our Nation's veterans. Like the veteran population we serve, however, this VA physical plant is aging. Improvements and alterations are necessary. In some cases, total replacement of these facilities will be more cost effective. To meet these construction requirements demand a commitment to a capital investment program which permits improvements in our facilities to keep pace with state-of-the-art modern medical care.

In this regard, the VA's proposed fiscal year 1984 construction budget request now before the Congress is the largest construction measure ever proposed by the Veterans' Administration. This proposal reflects our continued and strong commitment to provide a modern, comprehensive and independent health care delivery system which meets veteran health care needs.

To assist us in planning for our construction resource requirements, the VA in recent years has initiated a number of significant improvements in our facility planning program. These improvements, one of the most significant of which is the medical district initiated program planning or MEDIPP process, will help us to more effectively determine the construction needs of VA facilities on a systemwide basis.

Senator Boschwitz. Where are you? I see. You are on the top of page 5.

Mr. Sullivan. I am summarizing my written statement.

Senator Boschwitz. You skip around.

Mr. Sullivan. Just a few more pages here and I will conclude. Pending a full implementation of these planning refinements, a special review effort was also initiated for our fiscal year 1984 construction program.

Senator Boschwitz. Why do you give me testimony and then read something else?

Mr. Sullivan. I am summarizing my testimony, Senator.

Senator Boschwitz. All right. You don't have a copy of your summary?

Mr. Sullivan. Yes, we do.

Senator Boschwitz. I would like to have a copy. Why don't you give me a copy of your summary?

Mr. Sullivan. Sorry.

Senator Boschwitz. Where are you on the summary?

Mr. Sullivan. On page 3, the middle of page 3. Pending a full implementation of these planning refinements, a special review effort was also initiated for the fiscal year 1984 construction program. This review was directed toward insuring that the major construction projects we were considering for fiscal year 1984, which by the way were developed without the improved procedures, such as MEDIPP, that we are now implementing, were fully justified and based on accurate and defensible planning data.

As a result of this fiscal year 1984 project review, we are requesting your authorization for 36 major construction projects which include a replacement hospital in Minneapolis, eight nursing home care projects, nine clinical/outpatient improvement projects, and a variety of projects that correct safety and code deficiencies.

The review effort initiated last year was an interim response pending our planning improvements. We are now building on the type of comprehensive project review process used last year, and integrating the beneficial lessons of that review into the logic of our normal facility planning and project development system.

The Chief Medical Director and his staff are currently working with the Office of Construction and the VA's Office of Budget and Finance on specific improvements in our project development procedures which will incorporate these refinements into the existing process. The focus of these improvements will be to carry forward the team review approach used last year and to formalize a prebudget review of projects under consideration for funding to insure that nothing has occurred which impacts on their justification or need.

This concludes my verbal summary. We would be pleased to answer any questions you have.

Senator Boschwitz. Do any of your associates have comments that they wish to make or statements they wish to make?

Mr. Sullivan. No, Senator, they don't.

Senator Boschwitz. As you know, Mr. Sullivan—we can start on his questions or mine. As I am sure you remember, Mr. Nimmo acknowledge—Mr. Chairman, I was just going to start your questions. I have some of my own, but why don't you proceed?

Chairman SIMPSON [presiding]. Thank you. I really appreciate that very much. I hate to do that to a new member, much less a friend. My constituents were very fine and they were pleased that I was able to get away for a moment.

Senator BOSCHWITZ. You certainly polished them off pretty quick.

Chairman SIMPSON. Yes, but I was there. Just a brief glimmer—all right. Now this is an interesting issue to me, and you do recall when we had the HUD, the Independent Agencies appropriations process for fiscal year 1982, there were some fascinating things there, and the previous Administrator acknowledged to our colleague Senator Garn that the VA did not have a formal set of priorities upon which to base major decisions regarding VA construction projects, and Dr. West has suggested a priority system to be implemented through assessment of needs.

Very briefly, they are to provide for the patient's safety, provide the greatest medical needs, provide for the greatest demands on existing services—geriatric, population shifts, that type of thing—provide for normal renovation or expansion, provide for new facilities if funds are available.

How would the implementing of this list today change the ranking of any individual projects which have been included in the fiscal year 1984 construction budget request?

Mr. SULLIVAN. Mr. Chairman, as you probably know, last month we sent our priority methodology for fiscal year 1984 major contruction projects to the committee. It was developed by the Department of Medicine and Surgery and I would ask Dr. Jacoby to perhaps elaborate on that and try to answer your question.

Chairman SIMPSON. Yes, please.

Dr. JACOBY. I am not familiar with what Dr. West has presented, but it would appear that many of the topics that you were referring to certainly played a part in our priority listing.

We have a well-devised system of establishing construction projects. The basic, fundamental decision process rests in the field from which projects are devised. The need for projects is developed in our medical district initiated planning process known as MEDIPP These projects are then submitted to the central office, and they are in various categories both in major and minor construction. We have two major categories that we would look at in regard to prioritization, those with primary factor deficiencies and those with secondary factor deficiencies. When we look at primary factors, we are obviously looking at demonstrated need. These projects are to meet the requirements to provide quality health care for our veterans. Demonstrated need is our normal priority factor.

We also consider fire and safety standards and space and functional criteria. Meeting these standards assures the safety of our patients and the appropriate functional arrangement in order to accomplish our mission. Secondary factors that we consider if there is already an established institution, are the age, the condition of those facilities, the utilities and water, support areas such as laundry, powerplants, warehouses, and so forth.

We also consider the results of various inspections that have been done, such as the Joint Commission on Accreditation of Hospitals and our own internal review process—the systematic external review [SERP].

Once the projects are submitted and categorized, they are reviewed and we develop the 5-year plan which is done by categories such as replacement, modernization, clinical improvements, electrical, and so forth.

All of these projects are prioritized according to what we consider are our needs within the Department of Medicine and Surgery. Fundamentally, that is how we arrive at our budget each year and establish priorities for construction projects.

Chairman SIMPSON. As to revalidation, some members of the revalidation team expressed confidence that revalidation was a productive and worthwhile project and revalidation really produced cost savings.

I would inquire as to why the new Administrator, Harry Walters, was not briefed on the revalidation study upon his entry into the VA and whose decision, was it not, to recommend this approach to the new Administrator? What process will be used in the place of revalidation to insure, as I think the revalidation study did, that the project has the concurrence of all departments of the VA and is actually a high priority?

Mr. SULLIVAN. The Administrator was briefed on the fiscal year 1984 revalidation review. We concluded that there were some benefits certainly from revalidation. We did learn certain things and we did make certain cost avoidances. We feel that for the future, however, we can incorporate the beneficial lessons that we learned from the fiscal year 1984 project review in our normal planning process and not have to continue to have this extra-special effort wherein these individuals were taken outside of their normal tasks. So that is exactly what we are going to try to do. We are integrating the beneficial lessons from the revalidation into our normal project development process. The Department of Medicine and Surgery is working with the Office of Construction and the Office of Budget and Finance, which are the three groups which compose the revalidation, and are working up procedures based on, as I said, those beneficial lessons. We are doing that right now.

Chairman SIMPSON. The thing for me was to be involved in that debate and watch what occurred when we were told that there had been a priority list of construction projects, and then as we got going and asked for what further information there was—Jake Garn probed around in it—and then suddenly a construction project that was at the top had sunk to the bottom, or one that was in the middle had floated to the top. It seemed like an extraordinary situation where we have just taken on faith these priority figures for years, and that Camden was ready or Baltimore was ready or wherever was ready, and then not finding that to be so.

It looked like a real fill and push rock job when we came down to that, and that was appalling to me to see that. At least I did see it, I think, and so I wondered how—and I hear your explanation. It is precise and it is rather technical and I wonder if it really is all that machine like. I have a hunch it smacks of politics and pressures and all the stuff that is the reality of life around this joint, and that is what I am really going to try to find out in construction projects. It has some kind of an aroma that is rich.

I am not looking for anything. I am not one of those guys who come in and bleach my suits, but there is more to this and I will eventually find something out. I don't understand it, and the technical way you describe it is interesting, but not persuasive.

Mr. **Sullivan**. I think that we have made significant progress. There have been perhaps some planning deficiencies in the past, but we are working very diligently to improve things. I believe Dr. Jacoby has articulated the philosophy that we have. He may want to comment further.

Dr. **Jacoby**. I think that you raise a reasonable question, particularly as you look at the progress of various projects. We do prioritize these projects and it is quite possible that, all of a sudden, the No. 4 project may progress and be under construction and yet the No. 2 project may not. The projects will vary in the way in which the planning for those projects progresses, the rapidity with which they progress, and then I believe, when Mr. Salmond and the Office of Construction has input into these, that we again might see changes in the rapidity at which a particular project can be developed based on the specific technical requirements.

The initial MEDIPP input caused us to take a second look at several projects. At the time these projects were developed and appropriate priority was established. From the time that they were initially planned until such time as they were being considered for budgetary purposes we have seen changes. For instance, in affiliated hospitals where we anticipated a certain level of development in the mid-1970's, through passage of time we have seen medical schools either disaffiliate or significantly intensified so that changes in their space requirements occurred.

Certain projects were pulled off of their previous schedule and the speed at which that project was being developed was altered. This occurred during the time that we were doing the revalidation. There were projects where the cost per bed was high and rather than proceed with the project we pulled the project back and sharpened our pencils. I think that this is a dynamic situation.

Chairman **Simpson**. What was going on?

Dr. **Jacoby**.The reason why the cost of those beds would have been more than we had anticipated is still under review. Part of it was the changing requirements of that particular facility in association with an affiliation. The system is a dynamic one, and I think that on the whole we are responding to identified requirements in order to provide quality care.

Senator **Boschwitz**. Mr. Chairman, if I may interject at this point, it is interesting to hear Dr. Jacoby talk about the system being a dynamic one.

I think the description of what he just went through is what happened to us in Minnesota; as you may well imagine, I have an interest in that facility, and in 1981 I believe money was afforded that facility for site development. It was on the top of your list in 1982 and 1983 and had nothing other than delays and increasing costs as a result.

Is this something that we can expect to continue, or is this now going to go forward in such a manner that we can rely upon it and so forth?

Mr. **Sullivan**. I think Mr. Salmond, the head of the Office of Construction, can best respond to that, Senator.

Mr. **Salmond**. I can assure you, Senator, that the project is on schedule right now. We will be awarding a contract for the excavation, foundations, and structural steel, in October of this year.

Senator **Boschwitz**. Thank you. Have you developed a policy for awarding subcontractor, general contracts to local firms and minority-owned firms?

Mr. **Salmond**. There is no provision in the Federal procurement regulations that permits us, or to force a prime contractor, for instance, to hire local firms.

There is a provision, it is Public Law 95–507, having to do with Small Business Administration, and where a prime contractor must come forward and give us his breakdown of how many subcontracts will be going to minority contractors, and those which will be going to small business. We review these prior to award, but, as I said, there is no provision that we can force him to hire local subcontractors.

Senator **Boschwitz**. Well, I was not pacified by Dr. Jacoby's statement, Mr. Chairman, because as he describes the delays and so forth, I have heard all of them applied to this hospital, and so I am pleased to hear from Mr. Salmond that indeed it is on schedule and the contract is in the process and will be let at a time certain. That's just fine.

Chairman **Simpson**. Thank you. That hospital now is in the fiscal year 1984 request for a total of $269 million; is that correct?

Mr. **Salmond**. Yes, sir.

Chairman **Simpson**. At one time it was higher than that, was it not?

Mr. **Salmond**. Yes, sir. Last year we had a total estimated cost of $282 million. However, as the recession has caused the contracting business to forego much of its profit margins up and down the line, we are finding that many of the bids are coming in well under what we had originally anticipated. So, as we developed the 1984 budget, we had to reexamine our escalation policy and reduce it drastically from a couple of years ago.

We had double-digit inflation previously, but that is not the case today.

Chairman **Simpson**. Under your current timetable, how many jobs do you expect will be generated on that hospital for the construction phase over the fiscal years between now and the projected completion date?

Mr. **Salmond**. I would like to ask Mr. Neumann of my staff to answer that, if he could?

Mr. **Neumann**. Thank you. We have Bureau of Labor Statistics figures that indicate a $1 billion worth of construction creates about 11,400 direct jobs on the site, so I suppose if we could prorate that we might be talking about 700 or 800 jobs here as an average throughout the whole project onsite.

Chairman **Simpson**. That timetable will be adhered to by the Veterans' Administration?

Mr. **Salmond**. Yes, sir.

Chairman **Simpson**. Throughout?

Mr. **Salmond**. Yes, sir.

Chairman **Simpson**. Let me ask you about another facility, the 60-bed nursing home care unit for Providence, R.I.

DM&S has indicated that is the lowest priority nursing home in the fiscal year 1984 request. I understand that the VA's revalidation team has visited Providence and remained unconvinced of the need of that project.

Can you furnish any additional information or justification for the timing and location of that project?

Mr. SULLIVAN. I would like Dr. Jacoby to respond.

Dr. JACOBY. It was the lowest priority of the nursing homes in our 1984 budget. What we did and have done over the years is to look at what our requirements are throughout the United States on a district basis for VA beds, community nursing home and State home care beds, to determine where our VA nursing home care bed requirements are. We believe that there is a requirement for those beds, and we should proceed with the construction of the nursing home care unit in Providence.

Obviously that district would be approaching the planned requirement prior to possibly some other districts which would not have reached that level. This is in our long-term plan so that by 1987 we would have 13,100 nursing home care beds.

Chairman SIMPSON. Since I know that list of 10 has fascinated me, could you describe the reasons why the Houston, Tex. VA facility which has been No. 2 on the list of 10 most-needed replacement projects in the fiscal years 1980–84 plan, has now been shelved?

Mr. SALMOND. It has not been shelved, sir.

Chairman SIMPSON. It has not?

Mr. SALMOND. No. We are currently developing concepts, and advertising for an architect engineer firm to assist us in completing preliminary planning.

Chairman SIMPSON. Developing concepts?

Mr. SALMOND. Yes.

Chairman SIMPSON. What's that?

Mr. SALMOND. Well, our architects inhouse develop concepts on how this project should be developed. On this project we could have a total replacement hospital or we could house some of the patients in certain of the existing buildings that we deem to be satisfactory with alterations. Another variation or concept might use more of the existing facilities. These will all be reviewed by the Department of Medicine and Surgery and a recommendation will be made to Mr. Walters for a decision on which direction he wishes to proceed.

We developed a cost estimate with each one of these concepts.

Chairman SIMPSON. Another project then. In Medical District No. 26, the Veterans' Administration Central Office of Mental Health and Behavioral Sciences Service, directed the use of data for a MEDIPP without explanation of the data source.

Was this true for all reasons? If so, how does that fit the MEDIPP model of medical district-initiated plan?

Mr. SULLIVAN. Dr. Mitz is in charge of MEDIPP here and may be able to respond to that.

Chairman SIMPSON. You can sit down there, Dr. Mitts.

Dr. MITTS. Thank you, sir. The question refers to the process by which outpatient visit projections are made for several mental health programs: Drug dependence, alcohol treatment, day treatment, day hospital and mental hygiene. We have an outpatient projection methodology which develops a statistical projection for each of the mental health programs. The projections produced by the methodology are reviewed by Mental Health and Behavioral Science Service in VA Central Office based on consistency with historical workload trends, consideration of availability of staff, staff productivity standards, and professional judgment. The final projections are then negotiated based on consideration of the statistical projections in conjunction with professional judgement. In future MEDIPP submissions, the districts will be expected to apply and use a newly-developed model to generate their over-visit projections.

Chairman SIMPSON. So you think the MEDIPP procedure modeling are working and you are using them?

Dr. MITZ. Yes, sir.

Chairman SIMPSON. Thank you.

Dr. JACOBY. Mr. Chairman, I would like to comment that we are very cautious in regards to MEDIPP since it is a new undertaking. MEDIPP is something different than has been done before, which is needed. It is again an opportunity to plan for the facilities from a decentralized organization rather than a centralized one.

Dr. Custis as the chief medical director felt we should be planning from our hospitals and not trying to plan from Washington back down. Obviously what happens in the MEDIPP process has the potential to be oversold, but as we look now at Dr. Mitts and his staff and what was produced by the first submissions, I think we are encouraged that MEDIPP as it develops over the next several years will shape an entirely different view of our long-range planning and our ability to accomplish our mission. We are very encouraged about the initial submissions of MEDIPP which we received in November.

The initial presentation to the Administrator was just this week, and we will be making additional presentations to the Administrator before the end of the month.

Chairman SIMPSON. OK. Mr. Sullivan, you submitted authorization requests for seven nursing home units. Is the need for those projects based solely on the policy decision to provide 40 percent of the VA nursing home care beds in VA facilities and additionally what is the reason for that policy?

Mr. SULLIVAN. I will let Dr. Jacoby answer that.

Dr. JACOBY. I can start. If Mr. McCracken would like to add anything—in the mid-1970's there had to be some rational basis to approach the requirement for nursing home care, and second, to site those nursing home care beds.

What was done at that time was to take our actual experience in the system to establish our fair market share. The survey showed that we were meeting about 20 percent of the total veteran population requirements. A plan was devised to estimate what our needs were based on this criterion. Based on this survey we developed the policy that we would continue building 40 percent within the VA, 40 percent in the community, and 20 percent in the State home program.

Our recent MEDIPP guidance allowed using variations within the district of 12 to 16 percent. These percentages reflect the most recent percentage of total demand that we are meeting.

Chairman Simpson. Some private sector hospital chains say they save money by using blueprints for more than one facility with minor modifications for the site.

Has the VA used blueprints or other planning materials in more than one project and if so, what savings have resulted, if any, and if there has been no reuse, I would be interested in knowing why?

Mr. Salmond. I remember in the sixties, I believe, we tried to use the plans for the Martinez, Calif., hospital at Charleston, S.C., but because of the differing programs at those two facilities we wound up practically redesigning the Martinez prototype for Charleston.

We attempted somewhat the same thing in California when we took the San Diego design and reproduced it at Los Angeles. If you look at those facilities from the outside you would think that they were one and the same, but they definitely are not because the programs at the Los Angeles hospital are so much greater than those at San Diego. Again, we just found we really totally redesigned within the shell of the San Diego prototype.

Chairman Simpson. Is there a new facility in San Diego, a fairly new facility?

Mr. Salmond. Yes, sir. It was opened in 1972.

Chairman Simpson. What is the occupancy rate of that VA hospital?

Mr. Salmond. I don't have that.

Dr. Jacoby. I don't have it, Mr. Chairman. We would be glad to provide it for the record.

Chairman Simpson. If you could; would anyone care to respond to that?

[Subsequently, the Veterans' Administration submitted the following information:

For fiscal year 1982, San Diego hospital experienced a bed occupancy rate of 66 percent.

Mr. Sullivan. I might add we are looking at prototyping which is what you are describing. We have been specifically focusing on prototyping for our nursing homes. We are attempting to come up with a prototype design for VA nursing home care units. We are sensitive to the point you are making and are specifically focusing on nursing homes because we feel that the nursing homes would be the most practical area for us to be able to duplicate over and over again the same plan.

Chairman Simpson. I wouldn't think that would have anything to do with the things you suggest, the difference between the services at Charleston and Martinez. I think the place to start—an area obviously where you are going to spend a lot of construction bucks—would be the 12 million veterans who will be 65 years or older 2 years from now, and we must assure that we provide facilities and yet don't overbuild the system because then 20 years down the road God willing, with no further wars, we will have outstripped ourselves, and so I hope you are giving careful attention to that.

Just a couple final questions on some projects: On Murfreesboro, I was interested to see that the construction alternative currently selected for that project is estimated to end up costing precisely the same amount that was estimated back in September before an alternative had been selected.

I was wondering whether that was because all three alternatives under consideration would cost the same or perhaps one alternative was clearly under serious consideration and the others were not? Would you share that with us?

Mr. **Sullivan**. The General Counsel, John Murphy, can respond to that.

Mr. **Murphy**. Senator, I was involved in the Murfreesboro situation all the way around with the White House Task Force. At the time we were addressing the issue we made estimates and because of the state we were in in the process, those estimates were as well based as possible, so it really became numbers upon which we had to rely for purposes of the timeframe and the congressional appropriations and authorization process—hence the similarity.

Mr. **Salmond**. Mr. Chairman, we have already gone out with the first phase of that project, and the bids came in under our estimate. We will be going out for bids on the second phase, the major portion of it, in July, and I expect that we may not spend the whole $17 million, and there will be a savings in the long run.

Chairman **Simpson**. One purpose of that project, of course, is to permit the Meharry Medical College to retain accreditation. If we were to view this project in isolation of that, what would need to be done to the present facility and at what cost to meet that purpose?

Mr. **Murphy**. To meet the purpose of accreditation?

Chairman **Simpson**. Yes. What are the costs relating to accreditation standards, but also what would be the cost just to serve the veterans without these other considerations?

Mr. **Murphy**. I am not sure that I can separate those out because that is not how they were separated. They were undertaken—Murfreesboro was the result of the joining of two interests. That was the Meharry and the racial situation, and with that is the need to the veterans, specifically the services of southwest Tennessee with Chattanooga having only an outpatient clinic. I have to confess, Senator, I am going to have to give some thought to that. I am not coming up with a very definitive conclusion.

Chairman **Simpson**. If you could provide the committee an explanation of that project solely in terms of how it fits in the needs and priorities of the VA construction process as isolated from the needs of Meharry Medical College; in other words, what veteran population would it serve? Is that population increasing or declining? What is the present capability of the Nashville facility to handle that population in comparison with other VA facilities' ability to handle similarly remote populations. Those are the things I inquire about, as well as other issues such as normally would be examined in the context of a clinical addition and alterations project like that.

Mr. **Murphy**. If I could just make one comment, we will do our best to provide you what you requested. The Murfreesboro situation is unique in that it was one of the instances in which we had an issue confronting the Federal Government joining with an issue of veterans.

I would just like to point out I think for purposes of understanding it that a similar thing has recently occurred in the country in that the issue of unemployment has recently been joined with the issue of meeting veterans' needs.

In the sense of the country addressing an issue it needs to address, I think you could say that Murfreesboro was political in that it was addressing for Congress a political problem similar to addressing the issue of unemployment, and in the vernacular sense of political with adverse connotations, I don't think it is that at all.

[Subsequently, the Veterans' Administration submitted the following information:]

Prior to the President's requested action to help Meharry Medical College achieve self-sufficiency, the following projects were scheduled for construction at the VAMC Murfreesboro.

Major Construction

Renovate Bldg. 3—Cost = $ 4.7 million

OPC Improv. B-2, Renov. B-7 (Psych)—Cost = $10.5 million

Minor Construction

Upgrade Fire Protection Water System—Cost = $650,000

As a result of the President's request for Meharry Medical College to meet accreditation standards and provide Meharry medical students access to surgery programs, a major construction project was developed to include renovation of Buildings 2 and 3, "Clinical Addition and Alterations", and was scheduled for design in fiscal year 1983 costing $1.7 million and construction in fiscal year 1984 costing $15.3 million for a total cost of $17.0 million. The project to renovate Building 7 is now a separate major construction project costing $3.5 million. The construction cost prior to the Meharry action being taken was $15,200,000. Currently the costs for major construction is approximately $20,500,000.

Upon completion of the "Clinical Addition and Alterations" construction project, the VAMC Murfreesboro will have surgery capability including a 40 bed surgery service.

The total veteran population for Medical District 11 is projected to decrease slightly (2.9 percent) from 1981 to 1990; however, the aged population over 65 will increase dramatically (113.4 percent) during this same period. This increase in the aged population is expected to increase the need not only for nursing home and extended-type care, but is also expected to increase pressures on the acute care resources in surgery and medicine.

Establishing acute medicine and surgery capability at Murfreesboro will enable the District to better serve the acute medical and surgical needs of veterans in remote areas. It will also enable the District to provide a better balance of medical care facilities to serve the needs throughout the entire District. The precise patient mix and flow among the affected VA medical centers is currently under study and is being addressed in the current cycle of the Medical District Initiated Program Planning (MEDIPP) process.

Chairman SIMPSON. What was the political activity there that you are aware of?

Mr. MURPHY. It wasn't active political activity in the sense of a campaign or a political pressure. It was in the sense of an allegation that historically, as a result of cultural past practices in the southern part of the United States, the black population were denied equal access to Federal facilities.

Chairman SIMPSON. How many of the VA facilities are not affiliated with medical schools?

Dr. JACOBY. It is 38, Senator; 134 facilities are affiliated with 100 medical schools.

Chairman SIMPSON. And are those that are not affiliated rather remote or what is the degree of accessibility of those?

Dr. **Jacoby**. The vast majority of those facilities are not readily accessible and do not lend themselves to affiliations.

Chairman **Simpson**. How did they get planted there?

Dr. **Jacoby**. Historically I would think would be about the only way to answer that.

Chairman **Simpson**. Politically?

Dr. **Jacoby**. I cannot answer that. From facts, I would say it was a decision to utilize Federal property and existing buildings in many situations. The VA hospitals were located in either the thirties or during the post-World War II era when the number of veterans was large.

Mr. **Salmond**. Mr. Chairman, I believe that you will find many of those facilities were transferred to us from either the Army or the Navy.

Chairman **Simpson**. Well, thank you very much. I appreciate your testimony and your patience, and I thank you.

[The prepared statement of William F. Sullivan, Associate Deputy Administrator for Logistics, Veterans' Administration, and the VA's response to written questions submitted by Hon. Alan Cranston, ranking minority member of the Senate Committee on Veterans' Affairs, follow:]

PREPARED STATEMENT OF WILLIAM F. SULLIVAN, ASSOCIATE DEPUTY ADMINISTRATOR FOR LOGISTICS, VETERANS' ADMINISTRATION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I AM PLEASED TO APPEAR BEFORE YOU TODAY TO DISCUSS THE VA'S MEDICAL FACILITY CONSTRUCTION PROGRAM, OUR FY 1984 PROJECT AUTHORIZATION REQUESTS, AND THE VA'S LONG-RANGE PLANNING PROCESS FOR MEDICAL FACILITY CONSTRUCTION.

THE VETERANS ADMINISTRATION HOSPITAL SYSTEM INCLUDES 172 MEDICAL CENTERS LOCATED THROUGHOUT THE UNITED STATES WHICH PROVIDE A COMPREHENSIVE RANGE OF HEALTH SERVICES TO OUR NATION'S VETERANS. THE SYSTEM OPERATES IN OVER 5,000 SEPARATE BUILDINGS WITH OVER 100 MILLION SQUARE FEET OF SPACE. LIKE THE VETERAN POPULATION WE SERVE, THIS VA PHYSICAL PLANT IS AGING. IN 1930

THE NEWLY FORMED VETERANS ADMINISTRATION INHERITED NUMEROUS MEDICAL FACILITIES FROM OTHER AGENCIES. ADDITIONAL VA MEDICAL FACILITIES WERE ACQUIRED FROM THE MILITARY OR WERE CONSTRUCTED IMMEDIATELY AFTER WORLD WAR II AND IN THE FOLLOWING YEARS. MOST VA FACILITIES NOW HAVE BUILDINGS OVER 30 YEARS OLD. INDEED, 53 PERCENT OF VA HOSPITAL BEDS ARE HOUSED IN BUILDINGS WHICH ARE OVER 30 YEARS OF AGE. THE MAJORITY OF VA MEDICAL CENTERS ALSO WERE CONSTRUCTED WITHOUT SIGNIFICANT OUTPATIENT CAPABILITY, AND SUBSTANTIAL CHANGES IN FIRE SAFETY CODES AND RELATED REQUIREMENTS HAVE BEEN MADE SINCE THE ORIGINAL CONSTRUCTION. WHILE MUCH IMPROVEMENT OVER THE YEARS HAS BEEN ACCOMPLISHED IN THESE FACILITIES, A GREAT DEAL REMAINS TO BE DONE.

THE DELIVERY OF QUALITY MEDICAL CARE DEMANDS A COMMITMENT TO A CAPITAL INVESTMENT PROGRAM WHICH PRESERVES AND PROTECTS FACILITIES AND PROVIDES IMPROVEMENTS TO KEEP PACE WITH STATE OF THE ART MODERN MEDICAL CARE. PROGRAM ENHANCEMENTS, RAPIDLY ADVANCING TECHNOLOGY, THE DEMANDS OF MODERN HEALTH CARE, CODE CHANGES, STANDARDS OF THE JOINT COMMISSION ON THE ACCREDITATION OF HOSPITALS, AND THE NEED TO ELIMINATE ARCHITECTURAL BARRIERS ALL CONTRIBUTE TO THE NEED TO MAKE IMPROVEMENTS. AS YOU KNOW, OUR PROPOSED FISCAL YEAR 1984 CONSTRUCTION BUDGET NOW BEFORE THE CONGRESS IS THE LARGEST CONSTRUCTION BUDGET EVER PROPOSED BY THE VETERANS ADMINISTRATION. THIS PROPOSAL REFLECTS OUR CONTINUED STRONG COMMITMENT TO MEETING THE FACILITY NEEDS OF A MODERN, COMPREHENSIVE AND INDEPENDENT HEALTH CARE DELIVERY SYSTEM WHICH PROVIDES FOR THE HEALTH CARE NEEDS OF OUR NATION'S VETERANS.

OUR FISCAL YEAR 1984 PROGRAM LEVEL REQUEST FOR CONSTRUCTION TOTALS 868.3 MILLION DOLLARS. OF THIS AMOUNT, 753.398 MILLION DOLLARS ARE REQUESTED FOR 35 MAJOR CONSTRUCTION PROJECTS INCLUDING THE REPLACEMENT HOSPITAL IN MINNEAPOLIS, MINNESOTA; EIGHT NURSING HOME CARE UNIT PROJECTS (INCLUDING THE RENOVATION OF BATH, NEW YORK) WHICH WILL PROVIDE 960 NEW NURSING HOME CARE

BEDS; AND OTHER IMPROVEMENTS IN CLINICAL SERVICES, PATIENT ENVIRONMENT, CORRECTION OF SAFETY AND OTHER CODE DEFICIENCIES, AND IMPROVEMENTS IN MEDICAL CENTER SUPPORT AREAS. IN ACCORDANCE WITH THE PROVISIONS OF TITLE 38, SECTIONS 5004 AND 5007, THE VETERANS ADMINISTRATION IS REQUESTING YOUR AUTHORIZATION OF THESE 35 MAJOR MEDICAL CONSTRUCTION PROJECTS AS DETAILED IN VOLUME 6 OF OUR BUDGET SUBMISSION. WE ALSO ARE REQUESTING YOUR AUTHORIZATION TO PROCEED WITH WORKING DRAWINGS IN FISCAL YEAR 1984 WHICH WOULD BE DESIGNED IN-HOUSE BY EXISTING VA STAFF FOR FIVE MAJOR CONSTRUCTION PROJECTS WHICH ARE CURRENTLY PLANNED FOR FISCAL YEAR 1985. FURTHER, WE REQUEST LEASE AUTHORIZATION FOR THE RELOCATION AND EXPANSION OF THE VA OUTPATIENT CLINIC IN PORTLAND, OREGON.

AS YOU KNOW, IN RECENT YEARS THE VA HAS INSTITUTED A BROAD ARRAY OF INITIATIVES TO IMPROVE OUR LONG-RANGE MEDICAL FACILITY PLANNING AND ASSIST US TO MORE EFFECTIVELY DETERMINE THE CONSTRUCTION NEEDS OF VA FACILITIES ON A SYSTEMWIDE BASIS.

IN PARTICULAR, IN TERMS OF HEALTH CARE CONSTRUCTION PLANNING, WE BELIEVE THAT THE MEDICAL DISTRICT INITIATED PROGRAM PLANNING PROCESS (MEDIPP) HOLDS GREAT PROMISE AS A DECENTRALIZED PROCESS WHICH WILL BETTER AID US IN IDENTIFYING AND RANKING CONSTRUCTION NEEDS ON A MEDICAL DISTRICT SPECIFIC BASIS. MEDIPP IS STILL IN ITS INITIAL STAGE OF IMPLEMENTATION AND WILL NO DOUBT REQUIRE FURTHER REFINEMENT. NEVERTHELESS, WE ANTICIPATE THAT THE DATA GENERATED BY MEDIPP WILL PROVIDE CENTRAL OFFICE PLANNERS WITH A MUCH IMPROVED ASSESSMENT OF VETERAN HEALTH CARE NEEDS THAT IS BASED ON A SOLID DEMOGRAPHIC FOUNDATION AND RESPONSIVE TO LOCAL CONDITIONS AND VARIANCES.

ONE PARTICULAR AREA OF EMPHASIS IN OUR FACILITY PLANNING IMPROVEMENTS IS TO ENSURE THAT THE DATA UPON WHICH OUR FACILITY PLANNING AND CONSTRUCTION DECISIONS ARE FORMULATED ARE ACCURATE AND RELIABLE. RECENT VA INITIATIVES IN THIS AREA INCLUDE THE DEVELOPMENT AND SUCCESSFUL TESTING OF A COMPREHENSIVE METHODOLOGY FOR UNIFORMLY ASSESSING THE PHYSICAL PLANT CONDITION OF VA MEDICAL FACILITIES, IMPROVEMENTS IN THE

DEVELOPMENT AND APPLICATION OF VA HEALTH CARE FACILITY SPACE PLANNING CRITERIA, AND A RESEARCH ANALYSIS OF THE SPACE AND FUNCTIONAL DEFICIENCY IDENTIFICATION (SFDI) SYSTEM TO IMPROVE AND REFINE IT IN ORDER THAT IT MAY BE BETTER UTILIZED AS AN EVALUATIVE TOOL AND BE FULLY INTEGRATED INTO OUR FACILITY PLANNING PROCESS. THROUGH MEDIPP, WE ALSO WILL BE ABLE TO SUPPLEMENT OUR PLANNING EFFORT WITH LOCAL INFORMATION ON ACTUAL AND PROJECTED VETERANS' NEEDS FOR VARIOUS HEALTH CARE PROGRAMS. TO ADVANCE THIS COMPONENT OF MEDIPP, THE CHIEF MEDICAL DIRECTOR, IN JULY 1982, PROVIDED HEALTH CARE PLANNERS IN EACH OF OUR 28 MEDICAL DISTRICTS WITH TECHNICAL GUIDANCE FOR PREPARING HEALTH CARE NEEDS ASSESSMENTS IN A MORE COMPREHENSIVE MANNER THAN WE HAVE HAD HERETOFORE.

MR. CHAIRMAN, I HAVE ONLY TOUCHED ON SOME OF THE PLANNING INITIATIVES WHICH HAVE BEEN UNDERTAKEN AT THE VA, BUT ALL OF THEM ARE DIRECTED TOWARD IMPROVING THE VA'S STRATEGIC PLANNING SYSTEM FOR HEALTH CARE FACILITIES. WE BELIEVE THAT THESE ARE

SIGNIFICANT AND SUBSTANTIVE INITIATIVES AND ONCE THESE IMPROVEMENTS, AND OTHERS WHICH CONTINUE TO EVOLVE, HAVE BEEN FULLY IMPLEMENTED. WE BELIEVE OUR LONG-RANGE FACILITY PLANNING CAPABILITY WILL BE GREATLY ENHANCED.

PENDING FULL IMPLEMENTATION OF THESE IMPROVEMENTS TO OUR HEALTH CARE PLANNING PROCESS, WE INITIATED A SPECIAL INTERIM EFFORT DIRECTED TOWARD ENSURING, PRIOR TO ACTUAL CONSTRUCTION FUNDING, THAT THE MAJOR CONSTRUCTION PROJECTS WE WERE CONSIDERING FOR FISCAL YEAR 1984 WERE FULLY RESPONSIVE TO VETERAN HEALTH CARE NEEDS; APPROPRIATELY SIZED, SCOPED AND LOCATED; AND BASED ON PROJECTED WORKLOAD DATA AND ACCURATE SPACE AND FUNCTIONAL CRITERIA. THIS CONSTRUCTION PROGRAM REVIEW WAS AN EXTENSION AND INTENSIFICATION OF OUR NORMAL PROJECT REVIEW PROCESS, UNDERTAKEN AT A TIME WHEN SOME CONCERNS HAD BEEN EXPRESSED WITH REGARD TO THE VA'S PLANNING AND CONSTRUCTION PROGRAM AND PENDING IMPLEMENTATION OF THE PLANNING IMPROVEMENTS WE HAD INITIATED IN RESPONSE TO THOSE

CONCERNS.

IN TERMS OF THE PROCESS USED FOR OUR REVIEW, PROJECTS WERE SELECTED FOR REVIEW IF THEY COULD POSSIBLY BE READY AT THE TIME OF OUR FY 1984 BUDGET DELIBERATIONS. THE LIST OF PROJECTS WHICH POTENTIALLY COULD MEET THIS STANDARD WAS DEVELOPED BY THE DEPARTMENT OF MEDICINE AND SURGERY (DM&S), AND THE OFFICE OF CONSTRUCTION (O/C), AND EVENTUALLY TOTALED 57 PROJECTS. BOTH O/C AND DM&S ADVISED AT THE OUTSET THAT PROJECT DEVELOPMENT SCHEDULE DELAYS AND/OR DESIGN PROBLEMS WERE PROBABLE ON SEVERAL PROJECTS, AND THIS WOULD PRECLUDE THEM FROM BEING POSSIBLE CANDIDATES FOR THE REVIEW PROCESS. ALSO, SOME OF THE PROJECTS ON THE LIST WERE ALREADY UNDERGOING REDESIGN AND WERE INCLUDED ONLY BECAUSE THERE WAS A POSSIBLE CHANCE THAT THE REDESIGN COULD BE COMPLETED IN TIME.

THESE 57 PROJECTS WERE ASSIGNED TO ONE OF SIX MULTI-DISCIPLINARY TEAMS COMPOSED OF A REPRESENTATIVE FROM DM&S, O/C AND THE

VA'S OFFICE OF BUDGET AND FINANCE. THE TEAMS WERE ASSIGNED THEIR LIST OF PROJECTS ON MARCH 25, 1982, AND WERE PROVIDED WITH GUIDANCE TO COMPREHENSIVELY REVIEW EACH PROJECT, INCLUDING A SITE VISIT, IF NECESSARY, USING THE MOST CURRENT PLANNING DATA, MODELS AND METHODOLOGIES AVAILABLE IN THE AGENCY. THEY WERE INSTRUCTED TO REVIEW THE PROJECT DEVELOPMENT SCHEDULE TO DETERMINE IF THE PROJECT COULD REALISTICALLY BE EXPECTED TO BE READY FOR FISCAL YEAR 1984 CONSIDERATION. THEY WERE FURTHER INSTRUCTED TO COMPARE PRIOR WORKLOAD DATA WITH CURRENT WORKLOAD PROJECTIONS FOR EACH PROJECT; TO REVIEW THE PROJECT'S DATA PACKAGE; TO EXAMINE THE PROJECT'S SPACE REQUIREMENTS; AND TO REVIEW AVAILABLE DESIGN DRAWINGS FOR THE PROJECT, COORDINATION OF THE PROJECT WITH OTHER PLANNED CONSTRUCTION, AND BACKFILL PLANS IF THE PROJECT WOULD RESULT IN SPACE BEING VACATED.

THE RESULTS OF THE TEAMS' REVIEWS WERE PRESENTED TO A STEERING COMMITTEE COMPOSED OF THE DEPUTY ADMINISTRATOR, THE CHIEF MEDICAL

DIRECTOR, THE ASSOCIATE DEPUTY ADMINISTRATOR FOR LOGISTICS, THE ASSISTANT DEPUTY ADMINISTRATOR FOR CONSTRUCTION, THE ASSISTANT DEPUTY ADMINISTRATOR FOR BUDGET AND FINANCE, AND THE GENERAL COUNSEL, FOR REVIEW, DISCUSSION, AND RESOLUTION.

BY JUNE 27, 1982, THE STEERING COMMITTEE HAD COMPLETED ITS DELIBERATIONS. THE CHIEF MEDICAL DIRECTOR AGAIN REVIEWED THOSE PROJECTS AND RANKED THEM IN THE DEPARTMENT'S PRIORITY ORDER FOR THE ADMINISTRATOR'S CONSIDERATION. A COPY OF THE DEPARTMENT'S PRIORIZATION METHODOLOGY USED TO RANK THE PROJECTS IN OUR FISCAL YEAR 1984 BUDGET REQUEST WAS RECENTLY PROVIDED TO THIS COMMITTEE.

THE REVIEW EFFORT WAS A SPECIAL INTERIM RESPONSE TO A SPECIAL INTERIM TIME. WE ARE NOW BUILDING ON THE TYPE OF COMPREHENSIVE REVIEW PROCESS USED AND INTEGRATING THE BENEFICIAL LESSONS OF THAT REVIEW INTO THE LOGIC OF OUR NORMAL FACILITY PLANNING AND AND PROJECT DEVELOPMENT SYSTEM. THE CHIEF MEDICAL DIRECTOR AND

HIS STAFF ARE CURRENTLY WORKING ON SPECIFIC IMPROVEMENTS IN OUR NORMAL PROJECT DEVELOPMENT PROCEDURES WHICH WILL INCORPORATE THESE REFINEMENTS IN THE EXISTING PROCESS. WITH THESE IMPROVEMENTS, WE BELIEVE THAT OUR NORMAL PROJECT DEVELOPMENT PROCESS WILL OFFER THE SAME LEVEL OF ASSURANCE REGARDING PROJECT JUSTIFICATION AS DID THE SPECIAL PROCEDURES PREVIOUSLY INSTITUTED FOR OUR MAJOR CONSTRUCTION PROGRAM REVIEW.

WITH REFERENCE TO THE CURRENT FIVE-YEAR MEDICAL FACILITY CONSTRUCTION PLAN SUBMITTED TO YOU IN JUNE 1982, THIS PLAN REPRESENTS THE FOURTH ANNUAL UPDATE TO CONGRESS ON PLANS FOR MAJOR CONSTRUCTION AT VA MEDICAL CENTERS.

THE PLAN COVERS THE PERIOD FROM FISCAL YEAR 1983 THROUGH 1987 AND IDENTIFIES 252 PROJECTS HAVING A CURRENT ESTIMATED COST APPROACHING 5-1/2 BILLION DOLLARS. THE PROJECTS IDENTIFIED IN THE PLAN WILL PROVIDE NEEDED IMPROVEMENTS AT VA MEDICAL CENTERS TO KEEP PACE WITH THE MANY CHANGES IN TECHNOLOGY, LEVELS AND

TYPES OF SERVICE, AND HEALTH CARE DELIVERY METHODS AS WELL AS THE AGING OF OUR FACILITIES.

THIS PLAN IS A PRODUCT OF THE DEPARTMENT OF MEDICINE AND SURGERY'S FACILITY PLANNING PROCESS THROUGH WHICH EACH MEDICAL CENTER UPDATES THEIR FACILITY PLAN ON AN ANNUAL BASIS. THESE INDIVIDUAL FACILITY PLANS ARE REVIEWED AND ADJUSTED AS NECESSARY TO FORM A COHESIVE NATIONAL STRATEGY. THE MEDICAL CENTERS' FIVE-YEAR FACILITY PLAN DETAILS CONSTRUCTION STRATEGIES AND SPECIFIC PROJECTS NEEDED TO SUPPORT THE PROGRAM MISSION AND LEVELS OF SERVICE AT EACH SPECIFIC MEDICAL CENTER. THE IMPLEMENTATION OF THE MEDICAL DISTRICT INITIATED PROGRAM PLANNING PROCESS (MEDIPP) WILL STRENGTHEN THESE FACILITY PLANS BY PROVIDING MORE FIRM PROGRAMMATIC PLANS FOR THE DELIVERY OF SERVICE AND THUS A STRONGER FOUNDATION UPON WHICH TO UNDERTAKE SPECIFIC FACILITY PLANNING.

IN ACCORDANCE WITH SECTION 5007 OF TITLE 38, THE FIVE-YEAR MEDICAL FACILITY CONSTRUCTION PLAN ALSO INCLUDES A LISTING

OF THE TEN MEDICAL CENTERS WHICH WE CONSIDER MOST IN NEED OF CONSTRUCTION, REPLACEMENT, OR MAJOR MODERNIZATION. IN THE JUNE 1982 FIVE-YEAR PLAN, WE HAVE ADDED THE BALTIMORE METROPOLITAN AREA TO THE LIST. WE ARE CURRENTLY ASSESSING THE NEEDS OF THE FACILITIES IN THE BALTIMORE METROPOLITAN AREA. WE RECOGNIZE MAJOR DEFICIENCIES IN THE EXISTING FACILITIES AND WOULD EXPECT TO COME TO SOME CONCLUSIONS IN THE NEAR FUTURE, AFTER THE MEDIPP REVIEW HAS BEEN COMPLETED. THE MEDICAL CENTER WHICH APPEARED ON THE PREVIOUS "LIST OF TEN" AND IS NOT ON THIS YEAR'S LIST IS PALO ALTO, CALIFORNIA (MENLO PARK DIVISION). THE NEEDS OF THIS FACILITY ARE BEING MET THROUGH MAJOR CONSTRUCTION FUNDED IN 1982.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, WE BELIEVE THAT THE CURRENT FIVE-YEAR PLAN OFFERS A RESPONSIBLE APPROACH TO MEETING THE FACILITY NEEDS OF THE VA HEALTH CARE SYSTEM. WE RECOGNIZE , HOWEVER, THAT AVAILABLE RESOURCE LEVELS MAY NECESSITATE CHANGES IN THIS PLAN AS WE MOVE TOWARD ITS IMPLEMENTATION, AND WE ALSO RECOGNIZE THAT THE PROCESS BY WHICH DM&S DEVELOPS THE FIVE-YEAR PLAN IS UNDERGOING MAJOR IMPROVEMENT AND REFINEMENT, PARTICULARLY IN TERMS OF THE MEDIPP PROCESS.

WE WOULD BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

RESPONSE OF THE VETERANS' ADMINISTRATION TO WRITTEN QUESTIONS SUBMITTED BY HON. ALAN CRANSTON, RANKING MINORITY MEMBER OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Question 1. On March 7, 1983, the VA transmitted an interim project prospectus for the construction of a new VA outpatient clinic in Los Angeles. In that prospectus you note, "On July 27, 1982, Congress authorized an extension of the current lease . . ." What action of the Congress were you referring to?

Answer 1. The House Committee on Public Works and Transportation passed a Committee resolution dated July 27, 1982, approving a modified GSA prospectus providing for a succeeding lease for 72,814 occupiable square feet of space to house the VA Outpatient Clinic at 417 South Hill Street in Los Angeles for a maximum term of 5 years, with a maximum firm term of 3 years.

Question 2.A. As I understand it, you now operate the LA Outpatient Clinic under a lease that expires on July 31, 1984. Is that correct?

Answer 2.A. The succeeding GSA lease expires on July 31, 1984.

Question 2.B.(i). Assuming that construction of a new facility is not completed by by the time the lease expires, what are your plans for the clinic at that point?

Answer 2.B.(i). The VA will request that GSA obtain a lease extension, so that we can remain at the 417 South Hill Street location until construction of the new VAOPC facility is completed.

Question 2.B.(ii). Can the present lease be extended by the Government?

Answer 2.B.(ii). The present lease document does not contain a provision for extension of the lease. However, we expect that GSA will be able to negotiate a succeeding lease for the space as they have done since July 1980. The original lease expired on July 31, 1980, and GSA has negotiated succeeding leases for the space since that time: first, a one year extension through July 31, 1981; next, a 1-year extension through July 31, 1982; and now, as noted above, a 2-year extension through July 31, 1984. The House Committee on Public Works and Transportation has authorized GSA to obtain a succeeding lease through July 31, 1987.

Question 2.C. If the present lease cannot be extended, does that mean that the clinic will be forced to relocate or would another lease be negotiated for the same premises?

Answer 2.C. A succeeding lease would most likely be negotiated for the same space on the same premises.

Question 2.D. Section 5004(a)(2) of title 38 provides that "no appropriations may be made for the lease of any space for use as a medical facility at an average annual rental of more than $500,000 unless each committee has first adopted a resolution approving such lease . . ." How do you believe that compliance with this provision of law has been achieved with respect to the lease of the present space for the LA OPC?

Answer 2.D. The approval of the House and Senate Committee on Veterans' Affairs is not required for a lease extension. GSA sought and obtained the approval of their authorizing Committee to extend the lease.

Question 2.E. Please provide a copy of the present lease (including any addenda or any other attachments or modifications) for the record.

Answer 2.E. A copy of the Supplemental Lease Agreement (GSA Lease #GS-09B-1018, dated July 27, 1982), is provided for the record. It is believed to contain all pertinent information relating to the current succeeding lease. The GSA Regional Office in San Francisco holds all other lease documents pertaining to our OPC space at this location.

Question 3. Attached is a printout relating to the construction of the LA OPC taken from the most recent Construction Management Information System (MIS) Project Status Report, dated March 11, 1983. I would appreciate your assistance in understanding it more fully.

Question 3A. What do the following entries mean: "Stage of Development: RQ"; "Funding: 83 RM-REP"; and "Prelms: 82 APF"?

Answer 3A. The following entries are defined:

Stage of Development: RQ - The project is in the requirements stage of project development.

Funding: 83RM-REP - Shows the initial year of funding. 83 is the fiscal year in which funds were appropriated. RM-REP is the budget category of the rpoject. RM stands for Replacement and Modernization category and REP means the project is a replacement rather than a modernization project.

Prelms: 82APF - Shows the Advance Planning Fund year for preliminary design.

Question 3B. From the MIS report it appears that you are estimating a total construction cost of $28.5 million for the clinic. What accounts for the difference between that amount and estimated total cost of $33.4 to $40.1 million cited in the interim prospectus?

Answer 3B. The cost of $28.5 million is the official budget estimate of record. It was a GSA estimate used by Congress in adding the Los Angeles Outpatient Clinic project in fiscal year 1983. Subsequent to the GSA estimate, VA examined the requirements and estimated a cost range of $33.4 to $40.1 million for the project. It should be noted that the $28.5 million did not include the cost of land purchase estimated at $4 million.

Question 3C. Please xompare the "tentative schedule" set forth in section VII of the interim prospectus with the schedule set forth in the MIS report and explain the significant differences.

Answer 3C. The "tentative" schedule given in the interim prospectus was an optimistic attempt to expedite the preliminary and working drawing development. This was done in order to make every effort to complete construction prior to the termination of the lease (or any available extensions). When the final prospectus is submitted with a firm schedule, the MIS will be adjusted to reflect this schedule.

Question 4. The MIS report indicates that on February 14, 1983, the VA advertised for architect-engineer services for the LA OPC project. I assume that this would be the private A/E referred to in your March 7, 1983, letter that will "assist the VA in the development of preliminary plans".

Question 4A. Is that correct?

Answer 4A. Yes.

GENERAL SERVICES ADMINISTRATION
PUBLIC BUILDINGS SERVICE

SUPPLEMENTAL LEASE AGREEMENT

SUPPLEMENTAL AGREEMENT NO. ~~20~~ 21

DATE July 27, 1982

TO LEASE NO. GS- 09B-1018

ADDRESS OF PREMISES
417-425 South Hill Street
Los Angeles, California

THIS AGREEMENT, made and entered into this date by and between STB ASSOCIATES, a partnership

whose address is 417 South Hill Street, Suite 1080
Los Angeles, CA. 90013

hereinafter called the Lessor, and the UNITED STATES OF AMERICA, hereinafter called the Government:

WHEREAS, the parties hereto desire to amend the above Lease.

NOW THEREFORE, these parties for the considerations hereinafter mentioned covenant and agree that the said Lease is amended, effective August 1, 1982, as follows: to extend the lease for two (2) years at increased rent. Paragraphs 9 and 11 are deleted and the following are substituted therefor:

9.. TO HAVE AND TO HOLD the said premises with their appurtenances for the term beginning on August 1, [illegible] through July 31, 1984, subject to termination and renewal rights as may be hereinafter set forth.

11. The Government shall pay the Lessor annual rent of $1,240,598.34 at the rate of $103,383.19 per month in arrears. Rent for a lesser period shall be pro-rated. Rent checks shall be made payable to:

SUBWAY TERMINAL BUILDING
417 South Hill Street, Suite 1080
Los Angeles, California 90013

22. The Lessor and the Government agree that this lease is upon condition that if the lease is not approved by Congressional resolutions as provided by 40 U.S.C. 606, this lease shall be void and of no effect, and in such event the rental rate recited in the lease shall be in full restitution for the use of the premises by the Government and the services performed by the Lessor during the period of occupancy by the Government; but if the prospectus is approved by Congress this lease shall be and remain in full force and effect. The Government agrees to diligently seek approval of this prospectus.

All other terms and conditions of the lease shall remain in force and effect.

IN WITNESS WHEREOF, the parties subscribed their names as of the above date.

LESSOR STB ASSOCIATES, a partnership

BY ______ (Signature)   Managing Partner (Title)

IN PRESENCE OF ______ (Signature)   417 S. Hill Street, Suite 1075
Los Angeles, CA 90013 (Address)

UNITED STATES OF AMERICA GENERAL SERVICES ADMINISTRATION, Public Buildings and Real Property

BY ______ (Signature) KATHLEEN A. KENNEDY   Contracting Officer (Official Title)

SHEET NO. 1 TO SUPPLEMENTAL LEASE AGREEMENT NO. 20 TO LEASE NO. GS-09B-1018 ATTACHED TO AND MADE A PART THEREOF:

23. The carpet in the Audiology Clinic and the 11th floor space leased by the Government shall be replaced by the Lessor, the cost to be included in the rent. The carpet shall meet Government specifications and will be installed within thirty (30) days of Lessor receiving this countersigned SLA. Also included in the rent are removal of unauthorized deadbolt locks on the primary exit from the Dental Laboratory, removal of an unauthorized throwbolt on the second exit door in the Dental Laboratory, installation of approved deadbolt locks on the Pharmacy computer room and reception area exit doors, and repair of the two broken hinges on the left leaf of the double fire doors on the exit ramp to the basement mezzanine.

With the exception of the work stated above, the Government accepts the space in "as is" condition and any repainting, carpeting, or similar refinishing during the term of this extension, shall be solely for Lessee's account.

24. In the event this lease is terminated before July 31, 1984, and no further lease is negotiated at this location, the Lessor shall be reimbursed for the unamortized amount due for carpet replacement. The unamortized carpet value for the Audiology Clinic is $17,805.40; the unamortized carpet value for the 11th floor space is $14,331.79. These amounts shall be prorated for early termination.

-0-

Question 4B. My understanding is that the Administrator approved the advertisement for A/E services in late December. Why was it not published until February 14?

Answer 4B. The advertisement was held up so that an interim prospectus could be developed and issued to the Committees on Veterans' Affairs. Once Congress had been appraised of the status of the project, it was more appropriate to advertise for the services of an Architect/Engineer.

Question 4C. When will selection of the architect-engineer be made?

Answer 4C. Selection is anticipated by the week of May 16, 1983.

Question 4D. Following the completion of ten preliminary plans (which according to the interim prospectus is scheduled for November 30, 1983), when do you expect the "refined prospectus," referred to in your March 7 letter, will be completed and submitted to the Veterans' Affairs Committees?

Answer 4D. The "refined prospectus" will be submitted to the Veterans' Affairs Committees when preliminary plans are completed. The date for completion of preliminary plans may change if the earlier dates in the schedule cannot be met.

Question 5. With respect to site acquisition for the new LA OPC, you note in your March 7 letter that the "refined prospectus" will "reflect a firm cost estimate for site acquisition." You further note, however, that you are "investigating with the Office of Management and Budget the possibility of a land transfer from GSA without reimbursement.

Question 5A. What is the status of your investigation?

Answer 5A. Under the new requirements of Federal Property Management Regulation 101-47.203-7 (f), implemented pursuant of Executive Order 12348 (February 25, 1982), the General Service Administration (GSA) may transfer property without reimbursement of its fair market value only under one of two conditions. Congress may specifically authorize transfer without reimbursement or the Administrator of GSA, with approval of the Director, Office of Management and Budget, may grant an exemption from the reimbursement requirement. In order for the Administrator of GSA to grant such an exemption, the request, endorsed by the head of the executive agency, must explain how granting the exception is necessary to further essential agency program objectives. The unavailability of funds may be cited as justification for exemption, but alone is insufficient.

Question 5B. The tentative schedule in the interim prospectus indicates that you anticipated making a request for land transfer from GSA on March 1, 1983.

(i) Did this request go forward?

(ii) (If not) Why not and when will it?

(If so) When do you anticipate receiving a response from GSA?

Answer 5B. The VA has not yet requested the land transfer exemption from GSA. It has been determined that VA has funds within its Major Working Reserve which could be made available to reimburse GSA for the transfer. Letters of notification to the Committees on Veterans' Affairs, the Committees on Appropriations, and Office of Management and Budget have been prepared for the Administrator's review which would advise of the VA's intention to reprogram funds from the Major Working Reserve for acquisition of the outpatient clinic site by transfer. Should Congress or OMB object to reprogramming funds for this purpose, the VA intends to request transfer from GSA, along with an exemption for the reimbursement requirement. As noted in Answer 5A, Congress and OMB also have the option of directing the transfer of this land to the VA without the reimbursement requirement.

Question 6:

The interim prospectus for the LA OPC lists $700,000 "one-time non-recurring cost" associated with project activation and the $3,800,000 "other recurring" cost associated with present facility operation. Please describe what those costs would be.

Answer:

a) One-Time Non-Recurring Cost

One time non-recurring cost includes funding for:

- One time purchase of initial supplies such as engineering tools and maintenance supplies, building management cleaning supplies, initial purchase and stock of drugs, radiology film, laboratory supplies, etc.
- Moving into the new facility, i.e., installation of equipment to be relocated; moving of equipment and supplies for laboratory, dental, radiology, examining rooms, medical administration, etc.
- Purchase of non-equipment items such as examining room supplies, draperies, carpets, clocks, blackboards, signs, etc.
- Initial cost of cleaning the new facility prior to occupancy

b) Other Recurring Cost

- Recurring costs are required annual resources which relate to the outpatient workload performed at the clinic. These costs include expenditures for drugs and medications, supplies for laboratory, radiology, dental, medical, clinical, administration, etc. It also includes funds for beneficiary travel and maintenance of equipment. These costs do not include salaries for staffing the outpatient clinic.

Question 7:

When the new OPC is completed, will any other services or offices in the Los Angeles area be transferred to the new facility?

Answer:

Based upon conceptual plans, currently being developed, only those functions in the existing OPC wil be relocated to the new facility. At this time we have no plans to include other services or offices.

Question 8:

What accounted for the long time delay between the time that GSA found the present LA OPC building seismically unsafe and the time that the VA forwarded a space request to GSA -- from April 1977 to March 1980?

Answer:

4/77 - GSA notified VA of reloction.

10/31/78 - VA sent GSA Standard Form 81, Request for Space. The space requested was 107,040 square feet.

9/5/79 - GSA sent VA Space Requirements for Solicitation for review.

12/12/79 - VA returned space requirements for solicitation and requested an increase of space to 107,950 square feet.

3/17/80 - VA requested GSA to revise the space requirements and increase the space to 111,950 square feet.

From 4/77 to 3/80 - VA and GSA continued to review and refine the amount of space needed to relocate the LA OPC.

Question 9A. Has the VA explored ways of expediting the construction process for the clinic, particularly in terms of reducing the time needed for development of preliminary and working drawings?

Answer 9A. Yes, the VA has explored ways of expediting the construction process.

Question 9B(i). [If so] Please describe ways that have been explored and, if they are not being implemented, explain why they were rejected.

(ii) [If not] (a) Don't you agree that every effort should be made to complete construction of the OPC prior to termination of the lease and any extension available to the VA?

(b) Would you please explore ways of speeding up the process so as to achieve that end and report back on the results of that exploration?

Answer 9B. The VA is requesting reprogramming funds in the amount of $4,000,000 from its Major Working Reserve to acquire a parcel of land from GSA in downtown Los Angeles. This will allow the $3,000,000 already appropriated to be used for funding working drawings. Construction of the project can then be accomplished within the lease extension periods.

Question 10:

Dr. David West, the former Executive Director for the Facilities Planning and Construction Committee (FPCC), indicated on page 2 of his prepared testimony that, in the so-called "Revalidation Study", the FPCC reviewed 57 proposed major construction projects and presented recommendations to a steering committee. He notes, as he recalls that "all votes by subcommittees and the steering committee were unanimous except one: San Francisco. The Department of Medicine and Surgery filed a dissenting vote on that proposed project."

A. Is the quotation accurate? [If not, please provide any corrections.]

B. What issue was in dispute regarding the San Francisco Medical Center?

C. On what basis did DM&S file a dissenting vote?

D. How was the issue resolved?

Answer:

A) Yes, the quotation is accurate.

B) The issue in dispute was the overall issue of parking. There exists a parking shortage at the San Francisco VAMC, and the NHCU construction will result in the loss of an additional 90 parking spaces. The project proposes a two-level parking structure which will support the increased parking need generated by the new NHCU. The revalidation team recommended that the project be deferred until the overall issue of parking could be resolved. If that could not be accomplished, it was recommended that the 120-bed NHCU be built at Livermore VAMC. The cost of the parking structure was a primary motivating factor in the team's recommendations.

C) The basis of the DM&S dissenting vote was that a decision not to build NHCU beds at San Francisco VAMC would not answer serious concerns on how to provide needed nursing home care to eligible veterans in the San Francisco catchment area. Relocation would cause additional problems with availability and accessibility, would worsen the community nursing home placement problem, and would reduce the medical care support capabilities planned for NHCU patients. The Department of Medicine and Surgery consciously considered the parking impact of this project, the existing parking deficiencies at the VAMC, and the need to make appropriate care available and accessible when it proposed the project. In the Department's judgement, the costs and benefits of the structure were considered to be worth the price.

D) The VA Administrator decided in favor of the appeal and the NHCU project, including the parking structure, was included in the FY 1984 budget request.

Question 11:

The Emergency Jobs Appropriations act, signed into law on March 24, 1983, will make available to the VA an additional $75 million for maintenance and repair projects in VA medical facilities.

A. Please provide to the Committee at the earliest possible time your detailed plans for utilizing these supplemental funds and a determination as to whether all $75 million will be able to be obligated in FY 1983.

Answer:

Our planning process for implementation of the Jobs Bill is well underway. However, detailed plans cannot be provided until the Assistant Secretary of Labor for Employment and Training provides a listing of high unemployment areas. All $75 million will be able to be obligated in FY 1983.

B. When may we expect these reports?

Answer:

Detailed plans for implementation will be available by mid-May.

Question 12:

The Paralyzed Veterans of America, in prepared testimony, has submitted an extensive discussion of the VA medical construction program and its relationship to the needs of veterans who suffer from spinal cord injuries. Please provide your comments on it, particularly with respect to the PVA's recommendations (on pages 38-40) for "cost-saving supplements to construction aimed at caring for SCI veterans".

Answer:

Based upon systemwide workload experience with Spinal Cord Injury (SCI) patients, and data developed through the recent Medical District Initiated Program Planning (MEDIPP) process, and a comprehensive needs assessment conducted by DM&S' Spinal Cord Injury Service, there is a demonstrated need for additional SCI beds. Currently, the VA operates 19 SCI units in the system with a total of 1,365 beds. Our currently-funded projects for the program are as follows:

Seattle	38 beds	(new)
Hampton	21 beds	(additional)
San Diego	30 beds	(new)
Memphis	120 beds	(replacement)
Richmond	120 beds	(replacement)
Miami	36 beds	(replacement)
Brockton	58 beds	(replacement)

The Paralyzed Veterans of America (PVA) in its' prepared March 16, 1983, testimony, mirrors the Agency recognition of the need for additional units in the Southwest and Texas in particular. The Department of Medicine and Surgery has been investigating a number of potential locations for SCI units and a recommendation will be forthcoming.

Concerning the PVA's recommendations (pages 38-40) for "cost saving supplements to construction aimed at caring for SCI veterans," we concur, that where VA facilities cannot be built because of an inadequate population of veterans to warrant construction, alternatives need to be given strong consideration. Provision of SCI services in satellite outpatient clinic settings and as a hospital based home care program have been and continue to be explored for possible expansion, where appropriate, to offer alternatives to hospitalization.

Chairman SIMPSON. Then the final witness of the afternoon, Dr. O. David West, fellow of the American College of Hospital Administrators and employee of the Hospital Corp. of America, Nashville, Tenn.

TESTIMONY OF DR. O. DAVID WEST, FELLOW OF THE AMERICAN COLLEGE OF HOSPITAL ADMINISTRATORS, HOSPITAL CORPORATION OF AMERICA, NASHVILLE, TENN.

Dr. WEST. My good friends of the Veterans' Administration, my name is O. David West, and I am an employee of the Hospital Corp. of America. I am here today in a private capacity, and I thank you for the privilege of appearing before you.

First, I would like to tell you how I came to be with the VA. I returned to HCA from Saudi Arabia where I was the director of operations for the King Faisal Specialist Hospital for my company in Saudi Arabia. When I returned, Mr. Charles Hagel who was then the Deputy Administrator, with the approval of Mr. Nimmo, contacted my company and made a request for HCA to provide a consultant for a period of 1 year.

HCA, of course, authorized that for me, and I was actually employed by the VA effective March 22 when I went off the HCA payroll. From March 22, 1982, until December 31, 1982, I functioned as the Executive Director of the VA Facilities Planning and Construction Committee and performed various studies, other studies as requested, and made recommendations both orally and in writing as was appropriate.

The four major reports that I filed with the VA are as follows: No. 1, A Confidential Analysis of Certain Aspects of the Veterans' Administration, With Recommendations.

In May 1982, Mr. Nimmo and Mr. Charles Hagel requested that I do a confidential general overview of the VA as an outsider, giving my honest, personal opinions, and making recommendations for improvement.

I complied and presented that report to Mr. Nimmo in May.

No. 2, A Revalidation Study of 57 Potential Construction Projects for the 1984 Budget. In July 1982, Mr. Hagel requested that I function as an Executive Director of the Facility Planning and Construction Committee, review the 57 proposed major construction projects for the 1984 budget, present all recommendations to a steering committee and file a written report.

I complied and presented that report to Mr. Sullivan in July 1982. As I remember, all votes of the subcommittees and the steering committees were unanimous except one, and that was on San Francisco. The Department of Medicine and Surgery filed one dissenting vote on that proposed project.

No. 3, A Review of the Revalidation of Potential Fiscal Year 1984 Major Construction Projects, and Recommendations for Future Revalidation. Mr. Sullivan requested that I prepare a report reviewing the revalidation project and making recommendations regarding whether I thought it should be repeated. I did and presented that report to Mr. Sullivan in August.

Summary, HCA Sabbatical to the VA, December 13, 1982—I was requested by my company, HCA, to summarize my sabbatical at the VA. I complied, of course, and provided copies of my report to the VA. During my studies I always filed three copies of each report with the Veterans' Administration—no more. As requested by Mr. Nimmo, one copy was for the Administrator, one for the Deputy, and one for the Associate Director for Logistics.

Ladies and gentlemen, my reports speak for themselves. They are my opinions based on information available to me at the time. I am really proud of the job the VA does for veterans. I was a sergeant myself in the Marine Corps and served on active duty from 1953 to 1956.

My objective in doing the studies and filing the reports was to attempt to assist the veterans of this country in some small way, and I hope I have.

I would be pleased to answer any questions regarding any of these reports to the best of my ability.

Chairman SIMPSON. Thank you very much. I have been informed that Dr. Custis has not read your reports and that there is a desire to have him do so and transmit his views before the Administrator reads them, and I have several questions which arise in my mind if those are the facts.

Did you ever brief Dr. Custis on your findings and recommendations? And if so, what was his response?

Dr. WEST. No, sir, I never officially briefed Dr. Custis on any of the findings. I did discuss some elements and asked his advice and opinions on matters as I was doing the study, but I never briefed anyone or gave copies of those reports to anyone because I was requested by Mr. Nimmo specifically not to do so.

The reason I was given was that not knowing what the report might have in it, that some of the information might be embargoed budget information, and therefore should not be discussed outside until after obviously he had a chance to read it and make a decision.

Chairman SIMPSON. Dr. Custis did not have copies of the reports because of that decision?

Dr. WEST. To the best of my knowledge, he didn't. I never gave him copies.

Chairman SIMPSON. It would appear that there might be a bit of a hostility at the VA as to your reports and recommendations.

Would you say that might be so?

Dr. WEST. I considered my role at the VA as nonprovocative, nonadversarial. Certainly between the 18 VA employees that I worked with and certainly with the veterans' service organization I considered our relationship to be a cordial one because we were all working for the same thing.

I think sometimes when an outsider like myself comes into an organization like this maybe with a different approach to the matter, maybe with a little impatience when I didn't feel like I was getting all the cooperation that I should have gotten, that perhaps I might have been a little aggressive, but I don't think that there was any reason for anyone in the VA to feel there was any hostility involved. We tried very hard to make sure we were working for the same thing and that was, of course, to do something good for the veterans.

Chairman SIMPSON. Did you ever feel that your role was adversarial? You never did feel that?

Dr. WEST. Absolutely not; absolutely not.

Chairman SIMPSON. I have tried to find why they were filed away for many months and their existence unknown to the new Administration. I would be interested in that. Why do you think that was?

Dr. WEST. Well, I think that there was some feeling in the Veterans' Administration that some of the items in those reports, particularly the first two, the one on the confidential analysis where we were discussing things like mainstreaming and sharing of services and contracting out of Government services and some of the items in the revalidation itself, might have caused some consternation.

For instance, the revalidation project, I kept hearing from people, well, you guys did a great job but you didn't really do anything that we wouldn't have done ourselves. We would have found most of those things that you found and would have changed those.

Well, hindsight is good and so we decided the best approach to take, believing discretion is the better part of valor, was to say OK, that is not important who would have found it. It is a VA effort, but still, I might have stepped on someone's toes by doing that, coming in as an outsider, having employees at a grade below some of the supervisors voting and making recommendations on issues that some of their supervisors might not have agreed with, and some of those people I think probably were spoken to by their supervisors, but you have to ask them to really find out.

Chairman SIMPSON. That's true. Did you have any impression that any criticism of existing procedures would be rejected or did you hit a nerve with anyone or any set of projects in particular that you recall?

Dr. WEST. I had made a list of 30 subjects that I thought deserved new scrutiny. I discussed those with Mr. Nimmo, and Mr. Hagel, and Mr. Sullivan. Mr. Nimmo authorized me to start with Dr. Custis, to have discussions about this subject. I met with Mr. Custis and thought that we had a pretty good discussion. Then I discussed some of those subjects with Dr. Jacoby. I had the general feeling in discussing with both of them that they really felt like it was inappropriate for me to be involved in those issues because they were things an outsider shouldn't be looking at such as staffing of VA clinics 10 hours a day instead of 7, when I could go to a clinic and see 100 people waiting in line because everyone was scheduled for 8 o'clock in the morning or 1 o'clock in the afternoon, and then I was out of town a couple of days on business and I came back and Mr. Sullivan informed me that Dr. Custis had spoken to Mr. Nimmo and suggested that it wasn't appropriate for me to be involved in these things and perhaps I should back off.

After that I never looked at any of those 30 subject matters again.

Chairman SIMPSON. Never again? That was that?

Dr. WEST. That was that.

Chairman SIMPSON. Did you feel uncomfortable about that?

Dr. WEST. I felt uncomfortable about it, yes, and I had several discussions with Mr. Sullivan about it, and the policy stood. I was told not to do it, and I didn't.

Chairman SIMPSON. You were on sabbatical?

Dr. WEST. Yes, sir.

Chairman SIMPSON. Your pay was paid by whom?

Dr. WEST. I was being paid by the Veterans' Administration, yes, sir.

Chairman SIMPSON. On a contract basis?

Dr. WEST. Yes, sir.

Chairman SIMPSON. What was the amount of that contract?

Dr. WEST. $57.5, I believe; I was to be there 12 months, but after being given what essentially was to be a 12- to 18-month job which I finished in 3 months and then again 3 months later, I spent the last 3 months of my time at the VA waiting to appear at a hearing before such gentlemen as yourselves, and finally I resigned and left the end of December because I had absolutely nothing to do.

Chairman SIMPSON. Why did you accept this invitation to appear here today?

Dr. WEST. I think that there are many things that are going to be glossed over, and I was hoping that I would have an opportunity to at least suggest some things that this committee might like to know, and I have a few of those that I would like to point out if I might have just a minute.

Do you have some questions which probably would be those subject matters?

Chairman SIMPSON. I have got a lot of questions. I will present them to you in writing. You know, the revalidation study was a scenario where there was controversy. Obviously under your direction the major part was a team review of proposed construction on a project-by-project basis. That intrigued me. However, the first critical step of revalidation was selecting the, I think, 57 projects that you were to review.

How was the selection of the 57 accomplished? I would be interested in that.

Dr. WEST. The projects were selected before my arrival. I understand from Mr. Nimmo and from Dr. Jacoby that—excuse me—from Mr. Sullivan and Dr. Jacoby, that they were asked to get together with the Department of Construction to come up with a list of those projects that they felt like were close to being ready to go, to try to get all the projects that were close ready to be reviewed for the 1984 budget.

Chairman SIMPSON. Twenty-four of those twenty-eight medical districts projected decreases in veteran population in the near future. Two I think had a slight gain. Two others showed significant increase.

From your knowledge of the revalidation process, how did these projections influence the VA and determine the size and location of the placement of the facilities?

Dr. WEST. I didn't see any use of projected information in any of the projects that we reviewed. We did add projected information to them where we could get it based on very limited data from the 1980 census. I think it was something like 8 percent of a 12-percent sampling or 12 percent of an 8-percent sampling that we had available to us.

Chairman SIMPSON. Well, you heard the list of factors influencing eventual planning and construction. Dr. Jacoby presented that. What other factors influenced the site and the replacement facilities?

Dr. WEST. We took in each case one person from the Department of Medicine and Surgery, one person from construction, one person from finance. We took each project as it was justified, turned it around and said is this necessary, and what is necessary, and how high a priority is this item, and at what cost? And then we took the factors that were available for models within the VA and whatever guidelines that were available, ran the project through those, and then tried to use some good common horsesense in coming to a final recommendation, and we sat down and debated each one with the people involved to the extent where probably on better than half of them we actually made a field trip to see the facility and discuss it with the people onsite, and as I am sure you know, of the 57 projects, we found that 22 of them really needed some more work on the project.

Thirty-five of them we thought were good projects and ready to go.

Chairman SIMPSON. Because of the lateness of the hour I may have cut you off. Why don't you take a few minutes to summarize what it is that you found that you would like to share with us?

Dr. WEST. OK. I found basically that the physical facilities of the Veterans' Administration were really in bad shape, really in bad shape.

Two-thirds of the buildings were built prior to 1955, 1954, or in that neighborhood, when Hill Burton legislation was passed which means they were built prior to acceptable modern-day standards.

Now true, a lot of facilities have been upgraded to some extent in the past, but I saw facilities out in Arizona that would be closed by a Joint Commission on Accreditation. I saw facilities in upper New York that had pigeon feces on the inside of the windows. I saw buildings several floors high with a red frame painted around the window that became a fire escape.

I saw facilities being planned in areas where it gets pretty hot, and the windows did not open because there were psychiatric patients, and they were not going to put air-conditioning in those facilities. I saw facilities that were crowded, that were dirty, that were poorly maintained, and also saw some new modern, very nice facilities.

I saw a system that was trying very hard with some good people to do something for the veterans, but looking at it from a very short-term solution, trying to 1 year at a time within the system solve the problem of a deteriorating system.

I saw very little desire for people to look at long-range solutions to the problem or to look at different solutions to the problem.

I firmly believe the only way to save the VA physical facilities is to look at doing something maybe over a 30-year period because I really believe you are talking $50 to $100 billion and more if you went out and modernized the buildings today. If you do it over a 30-year period it is probably going to cost twice that.

The next statement would be, well, we don't have that kind of money. I think that is true, so if you look at some other alternatives, and this probably again is why I might be suspect, coming from private enterprise. The nursing home beds in the 1984 VA budget are about $125,000 a bed for construction and about $90 a bed to operate those beds.

Beverly Enterprises, the largest private nursing home company in the country, builds beds for one-fifth that, for $25,000 a bed, and they take a nursing home patient from the VA right now for half of that—$45 a day. Here we are getting ready to spend millions, maybe hundreds of millions of dollars trying to meet an objective of 13,000 nursing home beds, that is going to cost us five times as much to build, and twice as much to run, when it could very easily be done by private enterprise.

At the very least, if we didn't do that, and let private enterprise run them, we ought to find out how they do it, maybe let them build them for us and lease them from them or something like that, but it just seems to me absurd to spend that kind of money. If we are not going to get more money, then we have to get more bang for the dollars that we do have.

My projections on that in the study you will see over the next 50 years for veterans is that we are going to have a real demand for VA health care between 1990 and the year 2000. The VA does not have the long-range facilities, long-term facilities, to meet that need, so you are going to have to do something for all those patients. The average age of veterans is currently 62, 63, something like that. Of course, 10 years from now, it is going to be over that.

Priority—I think the priority system in the VA is far too complicated. I believe in a KISS principle—keep it simple, stupid! We tried in the VA to work something out on the priority system, and all I was able to get was the 30 or 40-page document that this is the priority and by the time I got halfway through it, it just wasn't simple enough for me. I never could follow what was going on with it. I hope you can. I am sure the people doing it were trying with good intention, but they just didn't make it.

I found that 88 percent of the patients in the VA system had some health insurance—no attempt is made by the Government to collect any of it. I am not talking about just medicare now. I am talking about Blue Cross and Prudential and all these private insurance companies. A lot of money there could be collected.

I found that only 2 of those 28 medical districts have an increase in population, and yet we don't see the big money going into the south Florida's and the southern Arizona's and those places where the population is growing.

I see the expense for the VA, the present rate will be unbearable by 1990. It is going to be $50, maybe $100 billion—$27 billion now, one of the largest budgets in the country.

I see community hospitals and community nursing homes with plenty of excess beds. I see the VA itself has gone in the last 15 years from 91-percent occupancy down to 75-percent occupancy. At the same time, the number of veterans has gone up 17 percent. I see 60 percent of the veterans in the VA hospitals are not service-connected. Maybe this is all right, but it should be brought to people's attention.

I see that everyone that looks at this revalidation process so far has said it was a successful project. We saved some money and yet I see the answer so let's don't do it again. Why not?

Ladies and gentlemen, I think we simply have stepped on too many toes in doing it. Next time maybe you should get someone who is a little more diplomatic than Dave West and maybe it will have a longer life.

Certainly that was not my intent. One last comment I would like to make, and that is prototypes. Blueprints are being reused right now, today, by both Beverly, the largest nursing home company in the country, and HCA, the largest hospital company in the country. There is no significant in delivery suites, operating room, or nursing stations, regardless of whether you built it in northern California or southern Florida.

There is a difference in snow load, in hurricane conditioning of a building, in seismic conditioning, but the general layouts of those buildings is not that different, and I see no reason why the Federal Government cannot take advantage of that. I would like to see someone look at the big picture of the VA, where it is going, and provide some new guidance for it, and to have the VA itself start looking at the big picture and not trying to look at 1 year, miniscule solutions which in the long run will not solve it.

Finally, and in conclusion, I would like to say once more that the VA has a lot of good people. They need some help. They are in it to try to help the veterans. They should be in partnership with you and in partnership with the veterans' service association, groups, quit fighting among themselves, and with these other groups, if you can accomplish that with the people that you have got in the VA today, you can really turn it around.

If you don't, I am really afraid there won't be a Veterans' Administration hospital I want to go into by the year 2000 when I am 65. Some of you may be in there with me.

Thank you.

Chairman SIMPSON. Well, that is rather a refreshing bit of testimony for this place. I don't hear you saying that for just high old drama somehow. I don't hear it that way. Maybe it is, and I may have misread it, and I don't believe that it is being presented like much testimony is presented, for high old drama, but you do have a conflict I think.

Is not your company involved in the construction of hospitals, nursing care facilities?

Dr. WEST. HCA doesn't manage nursing care facilities. Beverly Enterprises does. We manage hospitals. We do not build our own hospitals. We contract their construction out to other people.

Chairman SIMPSON. But the company——

Dr. WEST. The company manages them, yes, but it does not construct.

Chairman SIMPSON. All right, but your principal duty is managing hospitals after they are constructed?

Dr. WEST. Yes sir.

Chairman SIMPSON. So if there were more private hospitals, there would be the need for managing those hospitals and that could be contemplated?

Dr. WEST. Yes, sir.

Chairman SIMPSON. Did they ever present that to you at the VA? Did they say that you have a conflict and that is why we don't like your reports?

Dr. WEST. No, sir. I told them that. Actually they were very nice to me at the VA considering how hard I was on some of them.

Chairman SIMPSON. Well, I do sense that you are interested in the VA and the veteran, and that is important, but I must admit that I heard Dr. Jacoby—and this is no reflection on him—describe to me briefly a priority that is just out of space and I am supposed to look very wise and nod my head because I am in the U.S. Senate and I am supposed to know those things.

Dr. WEST. You look at five priorities that we gave you, Senator, and you will find that they are much simpler and very workable. That is the only way really that you can develop, I think, an adequate priority system is to keep it simple.

Chairman SIMPSON. Well, I happen to be involved in three areas of duty here—immigration reform, and I deal with the INS and the Immigration Nationality Act which was written in a chamber somewhere by demented lawyers; and then I happen to deal with the Nuclear Regulatory Commission, where a battery of lawyers has raised distinction upon distinction and they even have kind of an Administrative Procedures Act over there; and the VA is close by. I am a lawyer, and I know how I was when I was 30 years old or 25 years old and looking for something to do. I was something. I could really cover them up, and now it is up to us to try to uncover them, so that the governed can understand what it is they are supposed to be operating under. Right now it has reached an extraordinary situation I think at least in these three areas, most principally with the nuclear regulations as I deal with them—trying to unravel them actually—and then immigration reform, and then certainly the VA, but this is not a reflection on the General Counsel.

It is going clear back to General Counsels long before because when you have young lawyers working, you have got guys who have not been out in the real world. I know how I was myself. It took a couple of first degree murders and representing the guy who had his ear chewed off and taking on somebody who wanted probate before the body had even cooled. Really, you know, finding out what life is before you come here allegedly to serve your country—but really to make policy and be able to cluck over in Georgetown that it was you that stuck this piece in this bill this day—that is one of the problems of this joint.

Anyway, they will outwit and outwait all of us so don't count on me too much—I'm 51, and I can never make it. But I am going to pursue the issue of prioritizing these facilities. This is absurd in my mind, all this waste and so on. Let's get it down and see if we can't work toward some type of construction reform. I don't know what that is. There is only one of me. You can't clone yourself around this place, but priorities seem to me something we ought to look at, and especially so that No. 10 on the list doesn't pop up to No. 5 or No. 1 drops down to No. 5 or finally we don't even know what the 10 are or how they got there.

Do you agree that that is what you find there? What were the vagaries of the list other than what we have heard expressed here?

The list changed maybe because of retrofitting requirements or something like that, but what?

Dr. WEST. I found a lot of validity in that. I really didn't see some of the politics that you hear innuendos about.

Chairman SIMPSON. Did you find that?

Dr. WEST. I really didn't see that occurring. I heard one time one discussion about Minneapolis versus Houston, and that was a political discussion, but as soon as they found out I was listening that discussion stopped.

Other than that, all the discussions that I heard to the best of my memory were regarding the need for the facilities and the complaints from people, that sort of thing, from patients and from veterans' service groups. I really did not, I really could not in all honesty say that I was subjected to any great extent to any political discussions about putting a facility here or there. If it went on, it was not done in my presence.

Chairman SIMPSON. Well, I thank you very much, and I honestly would hope that the material you presented to the VA would not just be summarily rejected, and I have a hunch that, like in all reports, there might be a pretty good shred of truth or two in there, and I would hope that the VA might be open enough and sensitive enough to accept it not on the basis of "Aha, it is all wrong" but look at it and say there are some things in here that are right and that we could do something with. I would like to think, too, that the new Administrator Harry Walters, is that kind of a person who would accept some of those things, and that Don Custis would look at it, and instead of just saying well, there is a guy who was trying to do us in, accept it on the basis of a concerned veteran and a concerned citizen trying to express some feeling and things about a system of $26 billion worth of operation, and in direct health care itself, some 8 billion, so I appreciate your sharing your views and that will be very helpful to us I think, and I hope helpful to the VA, and I hope you will continue to communicate with the VA.

Dr. WEST. I would be very happy to.

Chairman SIMPSON. And I would like to know what that level of communication is in the future. Would you please keep me advised of that?

Dr. WEST. Yes, sir, I shall do that.

Chairman SIMPSON. Thank you.

Dr. WEST. Thank you for the opportunity to come to the hearing.

Chairman SIMPSON. We have some further questions perhaps of the committee, written questions, that I will furnish and ask your responses, or updates, within 2 weeks.

[The responses of Dr. O. David West, fellow of the American College of Hospital Administrators, Hospital Corp. of America, Nashville, Tenn., to written questions submitted by Hon. Alan K. Simpson, chairman of the Senate Committee on Veterans' Affairs, and Hon. Rudy Boschwitz, a U.S. Senator from the State of Minnesota, follows:]

RESPONSE OF DR. O. DAVID WEST, FELLOW OF THE AMERICAN COLLEGE OF HOSPITAL ADMINISTRATORS, HOSPITAL CORPORATION OF AMERICA, NASHVILLE, TENN., TO WRITTEN QUESTIONS SUBMITTED BY HON. ALAN K. SIMPSON, CHAIRMAN OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Question 1. You recommended that long-range program and strategic planning within and among Districts be included in the VA's construction planning process. What specific suggestions could you offer to the VA to aid in the implementation of this recommendation?

Answer 1. Obtain the best, most highly qualified planning consultant you can find - and let that individual do it slowly and properly. There are billions of dollars involved. The future of the VA as a quality health care system is at stake.

Question 2. Would you recommend that the VA convert to a financial planning system based on Diagnostic Related Groups (DRG)? How significant would be the effect of such a conversion on the construction planning process?

Answer 2. The VA should convert to DRG's to be consistent, or the oversight committees will have no way to make cost comparisons with other governmental or private hospitals.

Such a conversion should have little effort on the construction planning process. Capital costs are currently a pass through in the DRG formula.

Question 3. In your report entitled, "Summary HCA Sabbatical to the VA", you stated that you recommended to Dr. Custis that the VA obtain consulting assistance on MEDIPP. Why did you recommend that and to your knowledge, did the VA ever seek or receive such assistance from a private consulting firm?

Answer 3. When I reviewed MEDIPP, I saw many problems, and I sincerely thought a modern private consulting firm could assist the VA. I have been told the VA is in the process of seeking such assistance at this time.

Question 4. The proposed nursing home care unit at the San Francisco VAMC is estimated to cost $14.7 million - far more than the other 120-bed nursing homes. I understand that environmental opposition and parking constraints are responsible for a large part of this cost.

(A) I understand the VA's "revalidation committee" recommended deferring this project until parking arrangements were made with the Department of the Interior, or that the project be relocated to Livermore or Palo Alto. Why was this project requested for San Francisco with the additional request for a two-story parking garage?

Answer 4(A). Eighteen people on the Revalidation Teams and 5 out of 6 on the Steering Committee recommended deferring the project until parking arrangements could be made. It proceeded because the Deputy Medical Director filed a dissenting vote and the Administration supported his opinion.

(B) How much less would this project cost if it were relocated to Livermore, Calif.?

Answer 4(B). The project would be at least $4 million less if it was combined with other projects at Livermore as proposed.

Question 5. DM&S has indicated that the proposed 60-bed nursing home care unit for Providence, R.I., is the lowest priority nursing home in the fiscal year 1984 budget request. I understand that the VA's revalidation team that visited Providence remained unconvinced of the need for this project. Can you furnish any additional information or justification for the timing and location of this project?

Answer 5. DM&S solely determined priorities. The Revalidation Team and the Steering Committee were convinced of a need for the project because of high demand and a waiting list in Providence. It should not be low priority.

Question 6. Twenty-four of 28 medical districts project a decrease in veterans population in the near future. Two show a slight gain and two others show a significant increase. From your knowledge of the revalidation process, how did these projections influence the VA in determining the size and location of replacement facilities?

What other factors influenced the site and capacity of replacement facilities?

Answer 6. Future needs and population projections played little part in determining the size and location of replacement facilities. Current population information was "adapted" by DM&S, as far as I could determine, to justify decisions deemed appropriate to meet needs justified by "gut feelings" and political expediency.

Question 7. We have heard that the population and utilization figures used to begin the MEDIPP process by VAMC's and Districts were figures supplied by VA Central Office rather than gained by analysis of local experience. Is this true?

If so, how can the MEDIPP process provide a real "grass roots" planning tool?

Answer 7. The local experience played some factor, but basically MEDIPP is a Central Office tool.

The only way to be certain that MEDIPP is a "Grass Roots" planning tool is to give it time to develop and to provide management personnel in the VA Central Office that are sympathetic to the need for "Grass Roots" planning.

Question 8. In response to previous questions concerning the setting of priorities for construction, VA witnesses have often included "political sensitivity" as a factor in some way. During your term as a consultant at the VA, did you find such political consideration a factor?

If so, at what levels of the organizational hierarchy?

Answer 8. Political sensitivity is abundant in the VA at all middle management and above levels, but is extreme at department head and politically appointed positions.

I found that political factors definitely affected the day-to-day operations of the VA.

Question 9. What further suggestions could you offer to streamline the construction planning activities of the Department of Medicine and Surgery and the Office of Construction?

Answer 9. Use the services of a quality private company to teach new management of the Office of Construction how to build nursing home facilities for 25 percent of cost and hospitals for 50 percent of the cost. Phase DM&S out of construction. Direct DM&S to plan locally and regionally, and direct the Office of Construction to build.

Question 10. The fiscal year 1984 budget reveals nursing home construction costs of approximately $125,000 per bed while private nursing home construction costs approximately $25,000 per bed. In November 1981, the VA formed a task force to propose, evaluate, and implement ways to reduce the construction costs of its nursing home. The task force proposed about 60 measures to reduce the cost of a new 120-bed nursing home. Many were to be implemented on those fiscal year 1982 nursing home construction projects where they would not delay the working drawings and on all fiscal year 1983 projects.

(A) Which recommendations were implemented by the VA? What justifications were offered for not accepting the other recommendations?

Answer 10(A). As far as I know, the VA never seriously attempted to reduce construction costs. A few minor recommendations were made and implemented. Mr. Sullivan and Mr. Salmond were apparently unhappy with the results but felt only a 10 percent savings could be made, and did not pursue it to any great extent.

(B) What effect did these measures have on the fiscal year 1982, 1983, and 1984 projects? How much were saved on the construction contracts?

Answer 10(B). Minimal effect. Perhaps 10 percent on nursing home construction contracts.

(C) To what extent have these cost reduction measures been incorporated into the design of other medical facilities? For example, the most substantial reduction comes from the use of a modular design concept for the nursing homes. Was there thought given to use this concept in domiciliaries?

Answer 10(C). Minimal. I remember no discussions on domiciliary construction costs.

Question 11. What is your recommendation on the organizational status for the Office of Construction? Should it remain as it is or be joined with the VA planning functions in a new organizational unit? If this recommendation were implemented, would a revalidation study still be a valuable activity? If so, why?

Answer 11. The Office of Construction should remain a separate department, but the management, top to middle, should be replaced with modern, progressive leadership. A pre-budget review (revalidation) of all major construction projects should be accomplished each year prior to submission of the budget. WHY?

Billions of dollars of taxpayers' funds will be required to maintain and modernize the system. An annual, thorough overview for the Administration, the Veterans' Affairs Committees, and the OBM will help prevent abuse and waste of those funds. There is too much money involved to follow normal procedure.

Question 12. How do the functions of the Office of Facility Engineering, Planning, and Construction in DM&S differ from those of VA's Office of Construction?

Answer 12. The construction functions in DM&S and those in the Office of Construction are almost identical. Those in DM&S should be phased out.

Question 13. In your report entitled, "Summary HCA Sabbatical to the VA", you stated that in June 1982, you isolated 30 major policy areas in the VA that needed administrative action. What specific areas in construction were you referring to and what action would you recommend for these areas.

Answer 13. Attached is a copy of a memo itemizing the 30 policy areas in question. The policy areas were not directed specifically to construction, but are general policies that should be reviewed and updated to meet current needs.

Veterans Administration

Memorandum

Date: June 15, 1982

From: Executive Director, FPACC (001F)

To: Chief Medical Director (10)

Subj: Policy Decisions

Thank you for the informative meeting this morning. As we discussed, I would like to review current written policy on the following subjects, and assist you in clarifying or developing recommended written policy for Mr. Nimmo on these subjects, as appropriate. Kindly call me when you return to the office so we can continue these important policy discussions:

1. Policy to extend clinic hours from seven to ten hours to increase productivity 30% in certain clinic settings.
2. Increase hospital occupancy policy.
3. Decrease hospital average length of stay policy.
4. Future Nursing Home policy.
5. Future Dom policy.
6. VA utilization of new technology policy.
7. Staffing policy.
8. Thirty year facility modernization policy.
9. Mission review policy.
10. Affiliations policy.
11. Research policy.
12. Charging for service policy.
13. Options for the future.
14. Subspecialization vs family practice policy.
15. Master planning and MEDIPP policies.
16. Conversion of acute care beds to long term care beds policy.
17. Priority construction policy.
18. SCI policy.
19. Contracting policy.
20. Sharing policy.
21. Patient opinion policy.
22. Quality assurance policy.
23. Continuation or elimination of services policy.

ODW

VA FORM 2105
DEC 1981

24. Hospital location policy.

25. 90,000 beds policy.

26. 13,100 NHCU beds policy.

27. Depreciation reinvestment policy.

28. Construction prototype policy.

29. Air conditioning policy on all new construction and major renovations.

30. Specific hospital need determination by DM&S vs Office of Construction design policy.

21 JUN 82

O. DAVID WEST, Ph.D., FACHA

RESPONSE OF DR. O. DAVID WEST, FELLOW OF THE AMERICAN COLLEGE OF HOSPITAL ADMINISTRATORS, HOSPITAL CORPORATION OF AMERICA, NASHVILLE, TENN., TO A WRITTEN QUESTIONS SUBMITTED BY HON. RUDY BOSCHWITZ, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Question. What was the context and the nature of the "political" discussion VA officials had concerning the Minneapolis versus Houston facilities.

Answer. Bill Sullivan, the Associate Deputy Director for Logistics, Veterans Administration, stated to me that it would be nice if my committee determined that the Minneapolis VA hospital replacement was necessary and of high priority, because of Republican Congressional pressure, even if it was necessary to let the Houston VA hospital project slide, because that was a Democratic area.

I told him that my committee must call them as we see them or we would have no credibility on any project, and thus would be of no value to the VA.

Chairman **Simpson**. I believe that will conclude the hearing activity for today, and thank you very much for coming.

[Whereupon, at 6 p.m., the hearing was adjourned.]

[The committee received the following written statements and letters for inclusion in the hearing record:]

PREPARED STATEMENT OF ROBERT E. LYNCH, DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION

Mr. Chairman and Members of the Committee:

The American Legion is pleased to have the opportunity to present its views on S. 636, the Veterans Administration Administrative Procedure and Judicial Review Act of 1983.

Mr. Chairman, The American Legion submitted to the Committee, in the 97th Congress, its views on S. 349, a bill identical in language to S. 636, and which was adopted by the Senate, without action by the House of Representatives. We must advise the Committee, the position of The American Legion has not changed in the interim. The current position of this organization on the subject of judicial review is set forth in Resolution No. 141 (Ohio), adopted by the 1982 National Convention of The American Legion. Copy of Resolution No. 141 is attached to this statement and is commended to the attention of the Committee.

As was brought out in the Committee Report on S. 349, there may be some members of the Legion who are in disagreement with Res. No. 141, and who themselves are in favor of judicial review. That fact notwithstanding, we ask the Committee to bear in mind that Res. No. 141 was adopted by the Delegates to our National Convention, and under the Constitution of The American Legion, a document approved by the Congress, that Convention has supreme authority to speak in the name of The American Legion, and cannot be superseded by any other voice.

It is quite possible the subject of judicial review may be considered by another National Convention. And if such consideration leads the Delegates to mandate a change in position, the Committee will be so notified. The National Convention is a deliberative body, and all Delegates are heard before decision is taken by vote of the Delegates.

Speaking to the language of S. 636, may we say, Mr. Chairman, that the Legion has no essential problems with Titles I and II of the bill. We do believe the alternative procedure set forth in section 110 of the bill, providing for a hearing de novo prior to perfection of an appeal, to be unnecessarily bureaucratic, most probably leading to further delay, without substantial likelihood of any material gain to the claimant in achieving successful consideration of his claim. We say this based on our long experience in claims work. Ordinarily, what we can get from a local Rating Board is about all we can get at the Regional Office level. If we find a Rating Board is consistently negative in its approach to evaluation of law and evidence, we can usually get more favorable consideration, either at Central Office level through an Administrative Review or through appeal action. And The American Legion reserves the right to petition the Administrator to take corrective action with reference to Rating Board personnel we believe to be incompetent.

The essence of S. 636, insofar as the Legion is concerned, is to be found in Title III of the bill. This title would modify section 211(a) of title 38 USC and add to the title a new Subchapter to Chapter 71, to be titled Judicial Review.

As has been stated herein, The American Legion continues to express disapproval of the concept of judicial review for claims for benefits administered under title 38 USC. On the simple face of it, it would seem strange that an organization such as the Legion, which has been engaged in assisting veterans to develop and present claims before the Veterans Administration for more than half a century, would be opposed to a procedure that would open an additional avenue to the individual claimant in pursuing his quest for benefits. The fact is, however, that judicial review is one of those instances where things are not always what they seem to be - especially in the development of government procedures.

Permit us to present some of the reasons that lead us to make such a statement. And let us first say that the conclusion we shall draw from the points we intend to present is that veterans, under the present system of claims adjudication, within the agency of the Veterans Administration, receive more consideration and have a better chance to develop their claim successfully than they would if the possibility of litigation in the federal courts loomed over each case while it was in the process of development and presentation before local Rating Boards and the Board of Veterans Appeals. And let us add that part of the problem lies in the fact that the average person, including attorneys, would not understand how this could be so - because they are not experienced in claims development and presentation. It is necessary to engage in this work, as Legion Service Officers do, and to know how the VA adjudication system works, in order to take advantage of the various avenues that can be used to promote successful consideration of claims.

In the first place, entry of veterans claims into the federal judiciary system would immediately place the veteran in an adversary relationship to the United States, in seeking approval of claims. This is not now the case in adjudication of claims by the Veterans Administration. The present relationship of the claimant to VA is a cooperative one, in which both parties seek to develop the claim to the fullest extent before it is adjudicated. An adversary relationship immediately requires that as the claimant seeks to prove - and we note parenthetically, - not establish - but "prove," his claim, the Government must seek to prevent him from doing that, and must challenge any and all allegations the claimant may put forward, that are not clearly and conclusively supported by direct evidence.

This brings us to the second point; application of the rules of evidence. As soon as a veteran's claim enters the federal judiciary system, the rules of evidence will apply. This is not now the case in the VA adjudication system. Presently, VA will consider and often act on heresay evidence, second, and even third hand evidence - none of which would be admissible in a court of law. Over the years the Legion has secured favorable decisions in literally thousands of cases based on tangential evidence that a court would never admit.

The argument is put forward that if VA allowed a claim on evidence that is not directly contributory to the case, then the case would never go to court - so what harm is done. Our point is, however, that in our judgment, once VA claims rating officers become aware that ratings they make could conceivably be subject to judicial review they may very well change their attitude to one of "let the courts decide," and begin to rate strictly by the book. If this were to happen many more cases would be denied and thrown into the courts where they would be subject to rules of evidence. We believe this to be a risky proposition at best.

Also, we perceive that in an effort to defuse The American Legion's concerns about this matter, the authors have written into the language of the bill a provision that the courts may not try a veteran's case on appeal from the agency de novo. We must say we have no confidence in this provision, bearing in mind the federal judiciary is a co-equal branch of the government and in recent history especially, federal judges have consistently made clear they do not consider themselves bound by the legislative branch as to how they shall try cases that are properly before them.

Next, there is the matter of the doctrine of res adjudicata. It is our judgment that if judicial review of claims is instituted the doctrine will be applied by the judiciary. That would be a serious blow to the present efficacy of claims procedure, because it would prevent claims from being reopened once a federal judge had ruled on it. Presently, we are able to secure the multiple reopening of claims by submitting new arguments based on already reviewed evidence, and sometimes by the device of securing transfer of the claim to different rating agencies within VA. Res adjudicata would put an end to this helpful practice, and the result would be that we would lose on a significant number of claims in which we are now succeeding. We do not wish to give up this condition of maximum accessibility to the VA adjudication system.

In summary, we see nothing in the language of S. 636 that would, in our judgment, operate to the advantage of the veteran claimant. Instead, much of the language would inhibit the favorable aspects of the procedures now available to the claimant.

Title IV of the bill deals with the sensitive matter of attorneys' fees. The generous provisions in the bill will surely result in the bill being labelled as an attorneys relief act - though not by us.

Under the bill, as much as 25% of benefits gained under judicial review could be paid to attorneys. Given the fact that most claimants for benefits from VA are poor, this is not acceptable to the Legion. As is stated in our Resolution No. 141, the payment by veterans of costs to obtain benefits due them from the United States, based on honorable service in the Armed Forces, is abhorrent to the Legion. Presently, claimants have available the best counsel of VA employees. Additionally they have available the services of a number of veterans service organizations which are committed to working for the welfare of veterans and which have large trained staffs, all of whom are paid by the organizations to act as advocates without cost to the veteran, and without regard to membership in the serving organization, and to assist the claimant in obtaining all benefits due.

Even though veterans who might choose to avail themselves of the right to judicial review, and who would retain and agree to pay for the service of attorneys, would do so willingly and knowingly, the fact remains they would be paying for something to which they are basically entitled from funds they need for other purposes. We hope Congress is not going to put veterans in this position.

The American Legion has said all along that once judicial review becomes the law of the land, the money for attorneys is going to come from one of three sources - from the benefits gained in the litigation, from the pocket of the veteran claimant, or from the pockets of the taxpayers. Any of these three sources of funds for attorney fees is unacceptable to this organization.

Let us say at this point that we are not hung up on the present $10 limitation on payment to an attorney for assistance with a claim for a benefit. The $10 fee was set more than 50 years ago, and is clearly unrealistic today. The American Legion is amenable to an adjustment of the fee. We do not, however wish to see a limit eliminated, nor do we wish to see the fee raised to the level that it will attract attorneys into the claims adjudication process. The other avenues of representation available to claimants presently are equal to attorney representation, and are without cost to the claimant. We do not wish to see changed a system that is working well to the advantage of veterans.

Under a Judicial Review Act, there would probably be some cases won. The present VA system is not perfect, because no system is. Based on our sixty years of experience in veterans claims work, it is our considered judgment that there will be more cases lost than won when the VA system becomes subject to the examination and imposed judgment of Federal Judges. In other words, we believe veterans are, in the main, treated more generously by this Government under the present VA system of adjudication than they would be were they subjected to the tender mercies of the Federal Judiciary. In making this statement we ask that you bear in mind, it is not the function of the Legion to protect the interests of the Government of the United States. That Government has all the power and majesty of its sovereignty to do just that. It is the function of The American Legion, under the terms of the Charter granted us by Congress, to look to the welfare of the nation's veterans and that of their dependents and survivors, and that is the sole motivation of our organization in establishing its position in the matter of judicial review.

Mr. Chairman, and Members of the Committee, on the basis of the arguments adduced herein, it is the recommendation of The American Legion that S. 636 is neither necessary nor desirable legislation, and we hope the Committee will so conclude.

Before concluding on this subject, we do wish to make one other important point. We wish it to be known that should a proposal be put forward to establish the Board of Veterans Appeals as an independent agency to handle appeals of veterans claims, The American Legion has no objection to such disposition. It would be perfectly suitable, in our judgment for the members of the Board of Veterans Appeals to have the status of administrative law judges with completely independent authority to decide cases.

We thank the Committee for receiving our views on this important subject..

We proceed now to a different subject, as it is our understanding the Committee has invited comment on the Administration's proposed budget for Fiscal Year 1984 for construction within the Department of Medicine and Surgery. We are pleased to offer our views.

It must be said that The American Legion is gratified for the manner in which the Administration has responded to the ongoing need for renovation and replacement of facilities within the VA medical care system in its FY 1984 Budget proposal, by recommending an increase of $319 million in the construction programs for a total of $868 million. Most of this is allocated to the medical care program.

Mr. Chairman, we are extremely pleased to see that $254 million of the budgeted construction funds are earmarked for the Minneapolis replacement hospital, as originally proposed, with 725 acute care and 120 nursing home care beds. The American Legion has continually espoused the urgency of this badly needed and long overdue project, and we look forward to its progression.

The Veterans Administration Facility Planning and Construction Committee has completed its study and revalidation process of the major construction projects for FY 1984, and for the most part, as we expected, it was determined that there is ample justification for the projects, although further development was required in some cases.

As you are aware, Mr. Chairman, in response to the revalidation initiative, The American Legion provided VA with information relating to construction needs at the identified projects that was extracted from the site visit reports of our Field Representatives, updated where necessary, and developed into exhibits for each of the projects. The information indicated that in nearly every single instance, the projects were reflective of the actual needs within the VA medical care system.

An area of the VA medical construction program that concerns The American Legion is the amount of time between the conception of a project, once the need has been determined, and the completion of construction. It is apparent to us that there is a definite need for steps to be taken to abbreviate the construction planning timetable.

In reviewing the FY 1984 Budget proposal, it was noted that for the first time, authorization was requested to expend appropriated funds to accomplish working drawing designs on five projects which are to be given high priority consideration for the Administration's FY 1985 Budget proposal. By preparing the working drawings during FY 1984, it is acknowledged that construction on the five projects can begin early in 1985, provided they are approved and funds are appropriated. To The American Legion this is a sensible approach to shortening the time span.

In addition, the General Accounting Office report entitled "Opportunity to Reduce the Cost of Building VA Medical Facilities," pointed out that an extension of the Advanced Planning Fund to allow VA to contract for final designs while Congress reviews the projects could reduce overall costs. GAO stated that the time it takes to complete medical facility construction projects could be reduced by up to 15 months by extending the fund, which would necessitate Congressional action to amend VA's construction authority under 38 USC 5001.

The ability to expedite the development and completion of VA construction projects by 15 months, in the Legion's thinking, would result in substantial cost savings when compared to the lengthy course of proceedings that the projects currently undergo, and we feel that such a concept is worthy of consideration, provided VA controls the number of change orders to the construction contracts. Modifications to contracts lead to slippage on completion time and result in increased construction costs.

The VA medical care system consisting of 172 hospitals and 225 outpatient clinics represents a multi-billion dollar capital investment of the Federal Government in the most comprehensive health care delivery program in existence in this country, and probably in the world. It is an aging and deteriorating system that includes hospitals built before World War II, and uses some buildings much older than that. These aging structures were not configured to adapt to the practice of modern medicine. Therefore there is an immediate and ongoing need for renovation and replacement of facilities within the VA system.

The Medical District Initiated Program Planning Project implemented by the Department of Medicine and Surgery has produced some initial findings as a result of each Medical District's reassessment of its current and future needs. More likely than not, judging from our review of available MEDIPP data, mission changes at some VA medical centers will lead to some changes in future facility construction plans. And The American Legion will be watching this situation closely, as a consumer advocate for the nation's veterans.

Mr. Chairman, as was stated at the outset, The American Legion is pleased with the much needed increase in the Medical Construction Program proposed in the Administration's FY 1984 VA Budget request. We have been extremely concerned in past years when proposed construction funding has been reduced during budget negotiations in Congress.

The justification for each of the construction plans contained in the budget proposal has been substantially documented, and The American Legion urges full funding for each of these projects.

Thank you.

Attachment: Res. No. 141 - 1982 National Convention
The American Legion

SIXTY-FOURTH ANNUAL NATIONAL CONVENTION OF THE AMERICAN LEGION
CHICAGO, ILLINOIS, AUGUST 24, 25, 26, 1982

RESOLUTION: No. 141 (Ohio)

COMMITTEE: Veterans Affairs and Rehabilitation

SUBJECT: Oppose legislation which would authorize judicial review of the decisions of the Administrator of Veterans Affairs

WHEREAS, The American Legion is committed to the interests and the well-being of all veterans, their dependents and survivors who seek benefits from the Veterans Administration; and

WHEREAS, from the time of its founding, The American Legion has provided direct assistance to veterans, their dependents and survivors in filing, developing and presenting claims for benefits from the VA without cost to the veteran, and without regard to membership in The American Legion; and

WHEREAS, the experience of The American Legion in more than sixty years of claims work has demonstrated that the present system of claims that is administered by VA works to the best advantage of the claimant in that it does not involve cost to the veteran, is not an adversary proceeding and permits the informal presentation of evidence that operates to the advantage of the claimant; and

WHEREAS, there has been introduced in the Congress, legislation that would permit claimants for benefits from VA to institute litigation in the Federal courts, in furtherance of their claims; and

WHEREAS, such litigation is presently not permitted by reason of the provisions of section 211(a) of title 38, United States Code, which provisions codify existing law; and

WHEREAS, all claimants seeking benefits from VA have the right, as do all citizens, to seek judicial relief in matters involving their constitutional rights; and

WHEREAS, the principal reason advanced in support of judicial review of veterans claims is to insure the claimant's access to due process; and

WHEREAS, on the basis of its long experience in claims work, The American Legion is convinced that claimants presently receive more consideration under due process within the VA system of adjudication of claims than would be provided by judicial review, given the facts that judicial review would place the claimant in an adversary relationship with the government, and would require the claimant to adhere to the rules of evidence in support of the claim, which is not presently the case within the VA adjudication system; and

WHEREAS, under the doctrine of "res judicata" a court decision would preclude a reopening of the claim on the veteran's part, as contrasted by the VA's rules and practices which permit almost unlimited reconsiderations; and

WHEREAS, the prospect of the claimant paying in any fashion to obtain benefits due him from the Government of the United States as would have to be done in the instance of litigation, is abhorrent to The American Legion; now, therefore, be it

RESOLVED, by The American Legion in National Convention assembled in Chicago, Illinois, August 24, 25, 26, 1982, that The American Legion shall continue to oppose the enactment of any measure that would amend 38 USC 211(a), so as to authorize judicial review of the decisions of the Administrator of Veterans Affairs except as presently authorized in 38 USC 755 and 784, and Chapter 37 of such title.

APPROVED

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

PREPARED STATEMENT OF JAMES N. MAGILL, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the Veterans of Foreign Wars of the United States with respect to Senate Bill 636, the "Veterans Administration Procedure and Judicial Review Act."

The subject of judicial review of Veteran Administration (VA) benefit determinations has been before the Congress for many years. Since the 94th Congress, proposals have been introduced to afford veterans the right to their "day-in-court". As the second largest client agency in the Federal Government, the VA is one of the few agencies whose decisions are final with no further recourse available to the claimant. In supporting judicial review however, the VFW is not being critical of the Board of Veterans Appeals (BVA). We have praised the performance of the BVA in the past and do not foresee any reason to alter this support. The Board, under constant pressure from mounting work

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N.E. ● WASHINGTON, D.C. 20002-5799 ● AREA CODE 202-543-2239

loads and the increasing complexity of its cases, renders for the most part, fair and equitable decisions. However, human nature being what it is, errors in judgement or interpretation of law and regulation do occur. For this reason, the VFW believes it is time that the VA claimant be allowed to utilize the court system when certain actions warrant.

The voting delegates to our most recent National Convention passed Resolution No 775 entitled "Judicial Review," a copy of which is appended to my statement for your review. This resolution supports legislation which would provide judicial review of Veterans Administration benefit determinations concerning questions of law and regulation. The VFW believes this narrowly drawn resolution would adequately permit dissatisfied claimants to seek relief in the appropriate court upon exhaustion of their administrative appeals; meaning no law suit could be initiated until after a final decision has been rendered by the BVA. By limiting judicial review to questions of law and regulation we believe this would preclude a flooding of cases to the federal courts and, at the same time, preserve the informal, flexible review procedure currently enjoyed within the VA. The bill before us today takes judicial review somewhat further than what is mandated by VFW Resolution 775. We believe, the interpretation of facts by the BVA has not been the major inpetus behind judicial review; the interpretation of law and regulation, in our opinion, is most in question. While we support judicial review, we would prefer the provision providing for the question of fact be omitted.

Mr. Chairman, although our resolution does not address the issue of attorney's fees, we are of the opinion the current $10 limitation on such fees payable to attorney's representing veterans before the VA is unrealistic. The limitation on attorney's fees dates back to the post-Civil War period with the present $10 level being established in 1924. The intent of this limitation was to protect certain veterans from those attorneys who would resort to unscrupulous means in order to generate clients. It does not appear there was consideration given, at the time of posing this limitation, to the fact that court review would be a possibility or to the sometimes very complex nature of today's cases. This limitation also denies the VA beneficiary the freedom and right of choice of representation in pursuing a claim with the VA. We believe that a realistic fee schedule should be established for attorney representation in the prosecution of claims at the administrative level. In addition, we would interpose no objection to the attorney fee proposal at the judicial review level set forth in S. 636.

This concludes my statement. Again, thank you for the opportunity to present our views.

Resolution No. 775

JUDICIAL REVIEW

WHEREAS, Section 211, Title 38, U.S. Code, provides that decisions of the Administrator of Veterans Affairs on any question of fact or law under any law administered by the Veterans Administration providing benefits for veterans, their survivors or dependents are final and conclusive and not subject to review by any other official or court of the United States; and

WHEREAS, as mandated by the 82nd National Convention by Resolution No. 620, the Commander-in-Chief appointed a Committee on September 14, 1981, comprised of VFW Service Officers and VFW members who are prominent attorneys to review our position with respect to judicial review; and

WHEREAS, the Commander-in-Chief has reviewed and assessed most carefully the opinions and rationale of the Committee members; and

WHEREAS, the Commander-in-Chief has determined that the preponderence of Committee members support judicial review of the decisions of the Administrator of Veterans Affairs with respect to Veterans Administration law and regulations; now, therefore

BE IT RESOLVED, that the 83rd National Convention of the Veterans of Foreign Wars of the United States, upon the majority recommendation of the duly appointed and constituted ad hoc Committee under mandate of the 82nd National Convention, supports legislation which would provide judicial review of Veterans Administration benefit determinations concerning questions of law and regulation.

Adopted by the 83rd National Convention of the Veterans of Foreign Wars of the United States held in Los Angeles, California, August 13-19, 1982.

Resolution No. 775

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

PREPARED STATEMENT OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the privilege of presenting to this distinguished Committee the views of the Veterans of Foreign Wars of the United States.

My name is Donald H. Schwab and it is my privilege to serve the more than 1.96 million men and women of the Veterans of Foreign Wars as their National Legislative Director.

Mr. Chairman, the Veterans of Foreign Wars has historically had a vested interest in the Veterans Administration's construction program and our constituency has a parochial interest in all 252 construction projects listed in the Fiscal Year 1983-1987 Five-Year Medical Facility Construction Plan.

As pointed out in a hearing earlier this month before the House Veterans' Affairs Committee, the Deputy Administrator of Veterans Affairs, Everett Alvarez, Jr., stated that the VA is in a catch-up situation with respect to con-

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N.E. ● WASHINGTON, D. C. 20002 - 5799 ● AREA CODE 202-543-2239

struction. In his prepared text, Mr. Alvarez stated in part, " . . . most VA facilities now have buildings over 30 years old. Indeed, 53 percent of VA hospital beds are housed in buildings over 30 years of age. The majority of VA medical centers also were constructed without significant outpatient capability and substantial changes in fire safety codes and related requirements have been made since the original construction."

The Veterans Administration's long-range planning process has proven to be somewhat less than perfect due, in large part, to circumstances beyond that agency's control. Although the VA may have been better able to anticipate the migration of severely disabled veterans and retired veterans to the sunbelt states, there was little or no indication that so many businesses would relocate to warmer climes taking with them employees who are veterans. Therefore, and since several years elapse between proposed construction and the activation of facilities, medical centers and outpatient clinics in several states are experiencing extreme difficulty in furnishing veterans the medical care envisioned by Congress. Prior to the Medical District Initiated Program Planning (MEDIPP) process, input regarding construction requirements was received from the individual medical center directors, medical districts and regional directors which was then evaluated by VA Central Office which compiled a national plan of construction priorities taking into account known demographics and the needs of the current veteran population. This criteria is now being enhanced and fine tuned by the MEDIPP process which is a new strategic planning concept developed by the Department of Medicine and Surgery and which will play a major role in future five-year plans.

As is a matter of record, on February 19, 1982, the former Administrator of Veterans Affairs directed a revalidation of all major construction projects for the fiscal year 1984 and the out years. The purpose of revalidation was to develop a "defensible criteria," thus alluding that the criteria originally used was not defenisble. The VFW was deeply concerned with this action because of statements and innuendoes made by high officials in more than one agency questioning the need for a separate VA hospital and medical care system and suggesting that perhaps 30 hospitals could be closed. Notwithstanding our reservations, the revalidation process merely confirmed the need for projected construction although finessed by the study in conjunction with MEDIPP. Of the 57 construction projects considered under revalidation, 35 were found ready for consideration during the fiscal year 1984 and the remaining 22 would require further development for one reason or another. The President's proposed budget for fiscal year 1984 would allocate $868.2 million for construction in budget authority and $673.6 million in outlays. Obviously, therefore, even with the largest construction budget in the history of the Veterans Administration, funding still falls short of projected requirements.

With respect to the prospectus proposed for the fiscal year 1984, it would be difficult to fault the VA for site selections with but one exception. As a matter of fact, our Field Representatives whose primary duty is to survey VA health care facilities have identified many more needed construction projects and a listing thereof is appended to my testimony. We are, of course, delighted that $254 million is included for the 845 bed replacement hospital at Minneapolis, Minnesota, $78.8 million for major modernization of the Biloxi, Mississippi medical center, seven nursing home care units and nine clinical and outpatient facilities. We are, however, deeply concerned that no anticipated date is given for construction of a VA replacement hospital in the Baltimore metropolitan area. You will recall that on May 11, 1976, President Ford announced that a 400 bed hospital would be built in Baltimore. Funds for planning and design were appropriated in the fiscal year 1977 and construction funds, in the fiscal year 1980. Construction was to have commenced between June and October 1980 with 1983 as the target date for completion. The Veterans Administration has already spent $8 million on this project, $3.5 million for working drawings and $4.5 million for purchase of the construction site. Then, the project was cancelled due to budgetary constraints according to the Veterans Administration. Notwithstanding, we are all aware that the local health planning agency which had authorized the overbuilding and overbedding of community hospitals for personal, private financial gain strongly opposed the construction of this badly needed replacement hospital. This is the same scenario that delayed construction and increased the cost of the VA hospitals in Portland, Oregon and Minneapolis, Minnesota. While the Baltimore facility is listed as number ten in the priority list of hospitals most in need of replacement or renovation, further delay will merely increase its cost. Further design plans are not necessary and since construction could start immediately, funding should be included in the fiscal year 1985 budget. In addition, Baltimore is a highly depressed area in the labor market and going forward with construction at that time would create a meaningful and needed jobs program.

Mr. Chairman, we are concerned with the future of the Veterans Administration's domiciliary care program. As you know, the proposed fiscal year 1984 budget would reduce domiciliary care by $4.1 million, 334 operating beds and 110 FTEEs. In addition, the revalidation documents in my possession indicate that the proposed 208 bed domiciliary at Leavenworth, Kansas will be further reviewed in the upcoming fiscal year and, further, that the proposed combination 200 bed domiciliary and 60 bed nursing home care unit at Prescott, Arizona is to be changed. The reason given is that "the agency has since decided to proceed separately with a project for a 120 bed nursing care unit while studying the best alternative for providing domiciliary care at the medical center." Present planning will reduce operating beds to 7,444 in 1984 and envisions a daily census of 6,700 veterans. The MEDIPP process anticipates a domiciliary requirement in the future for 7,999 veterans or approximately 2.6 percent of the total veteran patient population.

Another concern of the VFW, Mr. Chairman, is the reduction of acute care beds. Public Law 97-72 mandates the Administrator to operate and maintain a total of not less than 90,000 hospital beds and nursing home beds while at the same time there is a Presidential mandate for not less than 13,000 nursing home care beds. If the 90,000 figure is adhered to, hospital beds would be reduced to 77,000 and if the VA continues to maintain an approximate 80 percent average daily census, the daily census would fall from the present 65,444 to 61,600. In our opinion, 77,000 acute care beds would neither meet the demand of the present veteran population nor be a viable immediately available back-up to the Department of Defense.

As mentioned earlier, Mr. Chairman, we believe that the VA construction budget is still inadequate to meet projected needs. We are, however, hopeful the increase in average employment of 2,306 personnel and the finessing of construction priorities will bring needed relief to the sunbelt states without diminishing the quality and quantity of care throughout the rest of the nation.

Thank you.

ADDITIONAL NEEDED CONSTRUCTION

WESTERN STATES

Waco, TX -- replacement hospital
Sheridan, WY -- replacement hospital
Prescott, AZ -- replacement hospital and domiciliary
Tucson, AZ -- replacement hospital
Long Beach, CA -- replacement hospital and bed section
Los Angeles, CA (Brentwood) -- replacement hospital
Livermore, CA -- replacement hospital
Reno, NV -- replacement bed section
American Lake, WA -- replacement hospital
Walla Walla, WA -- replacement hospital
White City, OR -- replacement domiciliary
Muskogee, OK -- replacement hospital

SOUTHERN STATES

Alexandria, LA -- renovate existing clinical services and support functions and add new addition
Charleston, SC -- clinical addition and renovate existing services
Beckley, WV -- clinicial addition and alterations
Clarksburg, WV -- clinical addition and alterations
Fayetteville, NC -- clinical addition
Lake City, FL -- outpatient and clinical addition (space deficiencies numerous)
Montgomery, AL -- construct a new outpatient clinic addition
Hampton, VA -- construction of new 200 bed domiciliary. (IG's Office feel that it would be more cost efficient to renovate existing five buildings) (foundations unsafe, etc.)
Lexington, KY -- construction of clinical addition at Cooper Drive Division (serious space deficiencies)
Cleveland, OH -- clinical improvement project

MIDWEST & NORTHEAST STATES

Newington, CT -- patient bed tower adjacent to buildings 1 and 2, and renovate the existing buildings
Perry Point, MD -- renovate "Circle Buildings" 1-H through 6-H or construction of a new replacement building
East Orange, NJ -- renovation of the Surgical Intensive Care Unit (SICU) and the second floor main lobby (space deficiencies)
Marion, IN -- remodeling of many patient buildings since they no longer meet the patient needs (constructed 1890's) and construction of 120 bed nursing home care unit
Kansas City, MO -- renovation of the Coronary Care Unit, Surgical Intensive Care Unit, Medical Intensive Care Unit, and expansion of all patient and clinical areas

PREPARED STATEMENT OF JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the over three-quarters of a million members of the Disabled American Veterans, may I say that we appreciate this opportunity to present our views on Senate Bill S. 636, the Veterans Administration Adjudication Procedure and Judicial Review Act of 1983.

Culminating years of study and examination which began in the 95th Congress, including Senate passage of judicial review legislation in the 96th and 97th Congresses, the various provisions of S. 636 propose certain statutory changes in Title 38, U. S. Code--changes which purport to insure that the full "due process of law" shall be made available to all those who seek to establish entitlement to benefits and services administered by the Veterans Administration. Essential to this goal, and contained in Title III of the pending legislation, is a proposal that would subject adverse VA benefit determinations to a "judicial review process" outside the Agency itself.

As you know, Mr. Chairman, under current law most VA benefit determinations (the exceptions being decisions relating to the Insurance and Home Loan Programs) are final and conclusive and not subject to review by any other official or court in the United States (Section 211[a] Title 38, U. S. Code).

Mr. Chairman, in accordance with a resolution approved by the delegates to our most recent National Convention, the Disabled American Veterans is in agreement with the primary thrust of S. 636. That is, we do believe that a veteran, or the dependent or survivor of a veteran, whose claim has been denied in the VA appellate process should be able to seek further redress in judicial proceedings outside the Veterans Administration.

Having stated our agreement with this fundamental aspect of S. 636, I must add that the DAV does find itself to be in disagreement with certain specific provisions of the bill. Our disagreements range from slight or moderate differences of opinion to unqualified opposition.

In setting forth our views on S. 636, I will deal with the bill in chronological discussion of its four major titles.

Title I

Collectively, the various provisions of Title I of the bill are designed to codify certain existing regulations, policies and procedures relative to VA benefit claims action which occurs at the local Regional Office level, after an appeal (Notice of Disagreement) has been filed, and continuing in the appellate process up to and including action by the Board of Veterans Appeals (BVA). Title I would also allow for the provision of certain new, additional appellate procedures and adjudicative course of action.

Mr. Chairman, codifying existing regulations, policies and procedures relative to the VA appellate process would obviously cover this process with the mantle of statutory protection. We have no objection to this.

We are also favorably disposed to the broadening of appellate courses of action at the pre-BVA level for those claimants who disagree with VA benefit decisions. However, we do offer the following comments and suggestions relative to specific sections of Title I:

Section 101 would add a new Section 3007, entitled Burden of proof: benefit of the doubt, to Chapter 51, Title 38, U. S. Code. We suggest that the language in Section 3007(b) be amended in part to read. "...involving a claim for benefits under laws, regulations, procedures and policies administered by the Veterans Administration,...."

We propose the addition of the underscored words to insure that the codified doctrine of "reasonable doubt" cannot be construed by anyone to mean that it is for application in the narrowest of senses; that is, applicable to only the statute itself and not to existing or ensuing regulations, procedures, policies, etc., which flow from the statute.

An example is in order:

If the medical evidence of record in a claim for an increased service-connected disability rating leaves a "reasonable doubt" as to the applicability of one of two percentage evaluations, then the higher of the two evaluations shall be assigned. The authority for making an adjudicative decision such as this is not contained in Title 38, U. S. Code. However, it is stated in CFR, Title 38, Sections 4.3 and 4.7.

If the doctrine of reasonable doubt is to be codified--and we believe that it should be--then it should be statutorily clear that the doctrine is to have the broadest of applications.

Section 103 of the bill proposes to amend Section 4001, Title 38, U. S. Code, Composition of Board of Veterans Appeals, to increase the membership of the BVA from its current maximum figure of 50 to a new maximum figure of 65. This increase of membership is proposed in order to enable the BVA to handle the increased work load which is anticipated to result from the enactment of S. 636.

Should a form of judicial review be enacted into law, we very definitely believe that BVA membership will be in need of expansion. In fact, it is our opinion that the BVA is currently understaffed, that it is hard pressed to properly handle existing work loads and that this had detracted from the quality and extent of consideration that should be given to each individual appeal.

Therefore, in view of the existing, heavy BVA work load and the increase anticipated due to enactment of judicial review legislation, we recommend that Section 103 of the bill propose to authorize a maximum BVA membership of 75 personnel.

Section 109 would amend current law to provide certain procedural rights in proceedings at the VARO and BVA level.

We believe that in paragraph (b) of the proposed new Section 4010 entitled, Adjudication procedures, the language should require the Administrator to receive and consider all evidence submitted by claimants and/or their representatives and that any decisions made relative thereto should be subject to judicial review.

We view all the provisions of the proposed new Section 4010(c) as beneficial to the claimant (in pursuing his claim) but offer a word of caution that implementation of these procedures should not detract from the present informality and non-adversarial nature of VA proceedings.

In this regard, we specifically refer to the claimant's right to serve "interrogatories" as proposed in Section 4010(c)(1)(F).

The language of the bill would allow such interrogatories to be served on any person--VA and non-VA personnel alike--who has contributed in a material way to the proceedings of a claim. We ask the Committee to consider the question, "Would such interrogatories, and the possible use of VA subpoena powers to elicit answers to such interrogatories, inhibit or detract from the cooperation of the private medical community in VA proceedings?"

As you know, independent medical opinions and private physicians' statements are very much a part of the evidence of record in many VA claims.

In the proposed Section 4010(d) we assume, and recommend an appropriate language change if this assumption is not correct, that a claimant's accredited representative is included as a "party" who can request the disqualification of a VA employee from participating in claims proceedings. We also believe that such requests should be made applicable to both appellate and pre-appellate adjudication proceedings.

We recommend that the proposed new Section 4011 entitled, Notice of procedural rights, contain language to the effect that all procedural right notices to claimants shall specifically inform them of their right to obtain assistance and representation from accredited service organizations.

Title II

Title II of the bill proposes to require the VA to comply with certain rule-making procedures presently contained in Section 553 of Title V, U. S. Code (provisions of the Administration Procedure Act). These procedures presently require all federal agencies to publish rule and regulation proposals and changes in the Federal Register, conduct public hearings with respect to same and solicit the opinions and comments of any interested party.

Mr. Chairman, for sometime the VA has been voluntarily complying with the provisions of Section 553 of Title V, U. S. Code. However, we do agree that the VA should be statutorily required to do so and we therefore support this provision of the bill.

Title III

Title III of the bill would amend Title 38, U. S. Code by adding a new Subchapter II--Judicial Review, to Chapter 71, Title 38, USC. The provisions of this subchapter would allow for review of adverse VA benefit determinations (excepting those under Chapters 19 and 37, Title 38, U. S. Code) through civil actions in the federal court system, after all appellate courses of action (in the agency) have been exhausted by a claimant.

Mr. Chairman, as stated earlier, in accordance with a mandate of our most recent National Convention delegates, the Disabled American Veterans does support the concept of judicial review--further redress of claims denied in the VA appellate process by a court or entity outside the Veterans Administration itself.

Mr. Chairman, when considering the propriety of the current VA adjudication process, it must be noted that the process is not "adversarial" in nature. That is to say, the VA seeks to grant, rather than deny, benefits if entitlement is at all possible under existing laws, rules and regulations. An objective analysis of VA benefit determinations would most likely reveal that, by and large, they are being made by competent, dedicated personnel in a fairly equitable fashion.

However, it must also be noted that a VA claim is a claim against the Veterans Administration and that the merits of a claim are evaluated by the Agency itself. The VA then performs the multiple role of defending itself against a claim, in some instances representing the claimant in the prosecution of the claim and, in all instances, judging the claim which it is also defending itself against.

Clearly, the goal of insuring the most equitable consideration of claims filed by veterans, their dependents and survivors requires that adverse decisions rendered by the VA should be subject to the oversight procedure afforded by a judicial review process.

However, Mr. Chairman, the delegates to our most recent National Convention have not mandated the DAV to seek judicial review as proposed by S. 636--placing such review in the Federal District Court System.

The official position of the DAV is in support of judicial review through the creation of an independent, permanent court--a Court of Veterans Appeals--composed of judges appointed from civil life by the President, such appointment being consented to by the Senate.

This Court would have exclusive jurisdiction to review benefit claims upon their final denial by the Board of Veterans Appeals and would have the authority to confirm, reverse, modify or otherwise change such BVA decisions. Review of VA claims and actions associated with such review would be the sole duty and responsibility of the Court.

The Court would also be empowered to (1) determine and allow reasonable legal fees in cases where the claimant is represented by a private attorney and (2) prescribe the qualifications of persons who may represent claimants in proceedings before the Court.

Mr. Chairman, we feel that our proposal for the creation of an independent Court of Veterans Appeals would provide a more equitable, efficient judicial review process than would the method proposed by the pending bill.

As you know, one valid complaint relative to the VA claims process is that the rating authorities located in the 57 VA Regional Offices across the country are lacking in decision uniformity. That is, depending upon the geographic location of the Rating Board, very similar claims will receive quite dissimilar adjudicative decisions.

It is our opinion that a single Court of Veterans Appeals would promote decision uniformity within the VA adjudication process much more expeditiously than would the 94 District Courts which presently make up the federal judicial system. Indeed, it is proper to ask if the 94 separate Federal District Courts would find it difficult to achieve uniformity in their own decision-making processes.

Secondly, we believe that litigation of veterans' claims in the Federal District Court System would be much more time consuming and costly to the claimant than in a Court of Veterans Appeals, whose dockets would have no other obligations.

There is no denying that Federal Courts are crowded and overburdened at the present time. Undoubtedly, the addition of 3,000 to 5,000 VA appeals would increase the burden on our Federal Courts and significantly increase the claim disposition period.

We believe that the smaller size and restricted responsibility of a Court of Veterans Appeals would promote, more rapidly and to a greater degree, an expertise in the handling of VA claims which could not be matched by the Federal Court System--hence the assurance of the most equitable redress of claims.

Finally, Mr. Chairman, I wish to point out that under the DAV proposal, a claimant could still retain a representative of a service organization as his counsel if he chose to do so. S. 636, by placing judicial review in the federal courts, would in fact bar VA claimants from continuing to use the free, competent service organization representation that is now available to them (most service organization representatives are not attorneys and therefore not licensed to practice in a Federal Court).

In recent years, over 85% of BVA claimants have had service organization counsel, the balance have had either no representation or the representation of private attorneys and other agents. Certainly the option to retain or to continue to use service organization counsel should be available to all veterans who may wish further redress of their claims. As indicated earlier, the DAV judicial review proposal carries no private attorney fee restrictions such as presently apply to representation in VA proceedings. Therefore, an unencumbered (by fee restrictions) choice of counsel would be given in all cases.

For the above reasons, we trust this Committee will agree that a Court of Veterans Appeals would provide for judicial review in the most expeditious, equitable manner. We have prepared a detailed legislative draft of our proposal and we would be pleased to submit it to the Committee for study and consideration.

Title IV

Title IV of the bill proposes to amend Section 3404, Title 38, USC, thereby modifying the current $10 fee limitation that presently applies to private attorney representation in VA proceedings.

Under the terms of the bill, the $10 fee limitation would continue in effect "for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered."

For claims resolved thereafter such first final decision, but still within VA proceedings, private attorney fees of up to a maximum of $500 are authorized, or, in the case of a contingency agreement between claimant and private attorney, no more than 25% of any past due benefits authorized. The bill further provides the Administrator with the authority to approve a fee in excess of $500 in cases involving extraordinary circumstances. Also, our understanding of the bill is that it does not preclude the payment of "reasonable attorney fees" in cases involving an unfavorable decision by the Administrator.

For representation by a private attorney in civil court proceedings, the bill authorizes the court to determine a reasonable fee for such representation, including contingency agreements of up to 25% of the past due benefits awarded. The bill also allows for payment of up to $750 in the case where a favorable decision is not granted by the court.

Mr. Chairman, the DAV has no objection to the payment of reasonable fees by a claimant for private attorney representation that occurs in judicial review proceedings--whether such judicial review occurs in the Federal District Court System as proposed by S. 636, or in an independent Court of Veterans Appeals as proposed by our organization.

However, the DAV is adamantly opposed to the removal or modification of the present fee limitation that applies to private representation in VA proceedings. A resolution to this effect was unanimously adopted by the delegates to our most recent National Convention.

Mr. Chairman, the current $10 fee limitation was set more than 100 years ago, at a time when Civil War veterans filing for federal benefits were easy prey for "unscrupulous" attorneys and other agents. Of course, a $10 fee in 19th Century America was more than likely quite commonplace and considered acceptable (for a variety of services) by the legal profession.

These facts are often cited by the proponents of VA fee limitation removal/modification as they exclaim, "Times have changed."

We assume that by this they mean (1) unscrupulous attorneys no longer pose a threat to VA claimants and (2) $10 can hardly be considered proper compensation for legal services that are rendered today.

The DAV essentially agrees with point number one. Though some attorneys might willfully and intentionally attempt to charge veteran claimants far in excess of the value of legal services rendered, more than likely a majority would not (this does not negate the fact that VA benefit dollars would be diverted from veteran claimants into the pockets of private attorneys).

We also concede the validity of point number two. A $10 legal fee in the 1980's has indeed gone the way of a good "five cent cigar."

Yes, Mr. Chairman, times have changed and we believe it is precisely this fact that argues most well for retention of the present attorney fee limitation.

One hundred years ago, if a veteran desired competent assistance and representation in securing a federal benefit based upon military service, the primary--perhaps sole--source of such representation was a private attorney.

However, today's veteran can avail himself, free of charge, of the competent advice, assistance and counsel of hundreds upon hundreds of accredited representatives employed by the veteran service organizations. Located in every state of the Union in every VA Regional Office, these "service officers" of the major veteran organizations have represented literally millions of VA claimants since World War I, securing, at no charge whatsoever, hundreds upon hundreds of millions of dollars in VA benefits and services.

The service officers of the DAV, American Legion, VFW, AMVETS, etc. are not voluntary workers but paid professionals, trained in VA law and completely familiar with the entire VA system of benefits and services. They are veterans themselves--in the case of the DAV, service-connected disabled veterans--which gives them an identity and empathy with their claimants that is an invaluable aid in the successful performance of their role as a veteran advocate.

Authorization of modern day legal fees for private attorneys representing veterans in a judicial review process is one thing; Opening up a new, lucrative practice of law by allowing private attorneys to enter into the VA adjudication process--when there is already in existence a nationwide system of free, competent legal counsel--is another.

Moreover, there exists ample evidence in support of our contention that service organization representatives are every bit as competent as private attorneys (in VA proceedings). Examine, if you will, statistical data from the VA's Board of Veterans Appeals (attached to this statement).

Some ten years ago, in fiscal year 1972, a total of 29,723 appeals were reviewed by the BVA. Of that figure, 6,770 (22.8%) had no representation; 22,382 (75.3%) had service organization counsel and 571 (1.9%) were represented by private attorneys or other agents.

In those appeals in which there was no representation, the allowance rate by the BVA was 10.9%; private attorneys/agents had an allowance rate of 13% and service organizations had an allowance rate of 13.1%.

Also, in fiscal year 1972, 88 (15.4%) of the 571 claims presented to BVA by private attorneys/agents were "remanded" back to local rating authorities due to incomplete or inadequate evidence development. The remand rate for service organizations was 15.1% (3,385 remands out of 22,382 claims).

Examination of the attached data reveals that during fiscal years 1972-81, insofar as service organization and private attorney/agent representation is concerned, the allowance rate of represented claims has been almost identical. Service organizations have had a slightly higher allowance rate than private attorneys in four of those ten fiscal years.

The remand rate--an indication of inadequate evidence development--was higher for private attorneys than service organizations in nine of the ten fiscal years.

This data certainly indicates that the VA claims representation provided service organizations is similar in quality to that provided by private attorneys.

However, Mr. Chairman, we contend that even this data is misleading and that, in fact, one can argue that service organizations provide superior VA representation.

It is important to note that service organizations will take VA appellate action both on their own initiative and upon the request of claimants themselves--in the latter instance, this holds true regardless of an objective examination of the merits of the case. That is to say, service organizations do not refuse to represent a claimant in an appeal no matter how bleak the prospects of securing a successful outcome may be.

Private attorneys, on the other hand, will "pick and choose," for an essential consideration in their decision to take a claim is the likelihood of securing a favorable outcome. If service organizations were "selective" in the handling of appeals, their win ratio would be much higher than is currently reflected in the BVA data.

This contention is further supported by data regarding the disposition of DAV initiated "Administrative Review requests" to the VA's Central Office here in Washington, D.C. (data attached).

An Administrative Review, while not considered an "appeal" in the normal VA sense of the term, can result in a Central Office decision that is binding on the local rating authority.

Administrative Review requests are considered appropriate when an issue involves policy or procedure of more than local significance, or a question of inadequacy or misapplication of the law, regulations, rating schedule, instructions, interpretations or precedents. Obviously, Administrative Review requests are generated by service organization representatives, rather than VA claimants themselves who are not versed in Title 38, U. S. Code or the Code of Federal Regulations which implements Title 38.

The attached Administrative Review data applicable to the DAV indicates that, when a service organization can be selective in choice of claims, there is a significant increase in the number of successful allowances. (For example, the DAV Administrative Review win ratio in 1981-82 was 87% of all claims presented.)

In short, Mr. Chairman, in view of the existence of competent service organization representation, we feel a disservice would be done to the American taxpayer and to future VA beneficiaries if the Congress were to modify the current attorney fee limitation. For in essence, it means that tax dollars appropriated by the Congress for the express purpose of providing direct monetary payments to service-connected disabled veterans, their dependents and survivors would be siphoned off into the payment of legal fees.

We also predict that if the Congress should allow private attorneys to enter VA proceedings even in the limited fashion proposed by S. 636, in a very short period of time, with their eye on the enormous dollar amount of benefits that are annually awarded in pre-appellate proceedings, the Congress will find American Bar Association witnesses petitioning for further fee limitation modifications. In all likelihood, the ABA would claim that they must be in on the "ground floor" in order to properly develop cases right from the original benefit application stage. Who can say if a future Congress could resist such an argument?

One final point, there are those who would say, "If VA claimants wish to incur the expense of hiring a private attorney, then they should be allowed to do so. It is their decision."

We respectfully remind this Committee that it has a duty and obligation to act in what it perceives to be the best interest of America's veterans population, their families and survivors.

The basic question this Committee must ask and answer is, "Would all future claimants be best served by modification of the current fee limitation applicable to VA claims proceedings?"

We think not. For it is our considered opinion that, at best, private attorneys would only offer representation equal to that presently afforded by the veteran service organizations. At the other extreme, the representation offered by private attorneys would not be equal to that of the veterans' organizations. In both instances, veteran claimants would have to pay for this representation--both good and bad.

As stated earlier, Mr. Chairman, we agree that payment of reasonable legal fees for private attorney representation in any VA judicial review process the Congress may see fit to enact is appropriate. But we respectfully request that the current statute applicable to payment of legal fees in VA proceedings remain intact.

This completes my statement, Mr. Chairman. Thank you very much for your kind attention to the views I have expressed here today.

* * *

DISABLED AMERICAN VETERANS

ADMINISTRATIVE REVIEWS

	1972-73	1974-75	1975-76	1976-77	1977-78	1978-79	1979-80	1980-81	1981-82
Number of Referrals from Field	157	90	85	107	159	128	87	89	125
Awaiting C File	14	0	23	22	30	14	24	40	21
No Action	81	59	27	40	55	65	28	27	61
Presented:	62	31	35	45	74	49	35	22	43
Pending Decision	5	0	0	8	7	11	2	3	12
Favorable	27	16	22	28	51	28	24	11	27
Denied	30	15	13	9	16	10	9	8	4
Percentage of Allowance	47.4%	51.6%	62.8%	75%	76%	74%	73%	58%	87%

BOARD OF VETERANS APPEALS
REPRESENTATION IN APPEALED CASES

REPRESENTATION	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
FY 1972										
None	6770	22.8	737	10.9	851	12.6	5078	75.0	104	1.5
Nat'l Svc Org	22382	75.3	2923	13.1	3385	15.1	15881	71.0	193	0.9
Atty/Agents	571	1.9	74	13.0	88	15.4	400	70.0	9	1.6
TOTAL	29723	100.0	3734	12.5	4324	14.6	21359	71.9	306	1.0
FY 1973										
None	6629	22.2	748	11.3	962	14.5	4798	72.4	121	1.8
Nat'l Svc Org	22561	75.6	3306	14.7	3826	17.0	15272	67.7	157	0.7
Atty/Agents	635	2.1	85	13.4	140	22.0	390	61.4	20	3.2
TOTAL	29825	100.0	4139	13.9	4928	16.5	20460	68.6	298	1.0
FY 1974										
None	5500	21.0	619	11.3	745	13.5	4023	73.2	113	2.0
Nat'l Svc Org	20145	76.9	2968	14.7	3340	16.6	13693	68.0	144	0.7
Atty/Agents	564	2.1	94	16.7	105	18.6	347	61.5	18	3.2
TOTAL	26209	100.0	3681	14.0	4190	16.0	18063	68.9	275	1.1
FY 1975										
None	4637	18.5	549	11.8	629	13.6	3279	70.7	180	3.9
Nat'l Svc Org	19783	79.0	3056	15.4	3260	16.5	13233	66.9	234	1.2
Atty/Agents	607	2.4	100	16.5	102	16.8	395	65.1	10	1.6
TOTAL	25027	100.0	3705	14.8	3991	15.9	16907	67.6	424	1.7
FY 1976										
None	4753	16.7	468	9.9	703	14.8	3509	73.8	73	1.5
Nat'l Svc Org	23063	81.0	3064	13.3	3951	17.1	15959	69.1	89	0.4
Atty/Agents	666	2.4	90	13.5	105	15.8	465	69.8	6	0.2
TOTAL	28482	100.0	3622	12.7	4759	16.7	19933	70.0	168	0.6
FY 1977										
None	5730	17.2	589	10.3	956	16.7	4121	71.9	64	1.1
Nat'l Svc Org	26827	80.6	3547	13.2	4120	15.4	18678	69.6	82	0.3
Atty/Agents	739	2.2	98	13.3	144	19.5	493	66.7	4	0.5
TOTAL	33296	100.0	4234	12.7	5220	15.7	23292	71.1	150	0.5
FY 1978										
None	5662	15.9	604	10.7	923	16.3	4074	72.0	61	1.0
Nat'l Svc Org	29264	82.1	3756	12.8	3726	12.7	21674	74.1	108	0.4
Atty/Agents	708	2.0	96	13.6	123	17.4	484	68.8	5	0.7
TOTAL	35634	100.0	4456	12.5	4772	13.4	26232	73.6	174	0.5
FY 1979										
None	5571	15.9	611	11.0	717	12.7	4189	75.2	60	1.1
Nat'l Svc Org	28657	81.9	3734	13.0	3934	13.7	20838	72.7	151	0.5
Atty/Agents	744	2.1	86	11.6	116	15.6	536	72.0	6	0.8
TOTAL	34972	100.0	4431	12.7	4761	13.6	25563	73.1	217	0.6
FY 1980										
None	4314	12.7	482	11.2	586	13.6	3188	73.9	58	1.3
Nat'l Svc Org	28978	85.2	3626	12.5	4198	14.5	20939	72.3	215	0.7
Atty/Agents	738	2.2	118	16.0	108	14.6	503	68.2	9	1.2
TOTAL	34030	100.0	4226	12.4	4892	14.4	24630	72.4	282	0.8
FY 1981										
None	3927	11.7	422	10.8	578	14.7	2874	73.2	53	1.3
Nat'l Svc Org	28759	86.0	3643	12.7	4034	14.0	20867	72.6	215	0.7
Atty/Agents	775	2.3	87	11.2	118	15.2	564	72.8	6	0.8
TOTAL	33461	100.0	4152	12.4	4730	14.3	24305	72.6	274	0.7

PREPARED STATEMENT OF CHARLES E. JOECKEL, JR., DEPUTY NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than three-quarters of a million members of the Disabled American Veterans, I am pleased to appear here today, Mr. Chairman, to present our views on the VA's Construction Program.

As you know, the VA's request for construction programs in Fiscal Year 1984 calls for funding of $868 million, of which, $808 million is devoted to the replacement and modernization of the VA health care system. Highlights of the Medical Construction Program include:

$86 million for outpatient improvements;

$41 million to meet fire and safety codes;

$94.6 million in clinical improvements;

$332 million in modernization and replacement projects;

$206 million in renovations, conversions and improvement in support services; and

$67.3 million to increase VA's nursing care capabilities.

MEDICAL CONSTRUCTION PROGRAM

Mr. Chairman, the DAV is pleased that the VA budget for Fiscal Year 1984 calls for the addition of a new geriatric research and educational clinic center and an expansion in nursing care beds of 300 next year. In addition, funding requests for new construction and conversion of existing facilities will result in 840 new nursing care beds in the system.

However, Mr. Chairman, of the $808 million in VA health care construction, only $67.3 million is set aside for nursing home care. Accounting for most of the 58% increase in construction funding for Fiscal Year 1984, is the scheduled replacement of the Minneapolis VA Hospital and the renovation, modernization and building additions at several health care facilities. In this regard, the DAV wholeheartedly supports the VA's efforts to replace and modernize its older facilities.

While we support full funding of the VA's request for construction programs, we are, nevertheless, concerned over the VA's effort to meet its most pressing demands on the health care system.

According to VA statistics, there are today over 3.3 million veterans age 65 years and older. By 1990 this figure is expected to rise to 7.7 million and to 9 million by the year 2000. Yet, with all of its resources, including 9,600 nursing care beds available in the system, the VA cannot meet its current demand.

Mr. Chairman, we are also concerned over the maintenance of acute care beds for the care and treatment of elderly veterans. Yet, the Fiscal Year 1984 budget projects the loss of 800 more acute care beds next year. This proposed reduction will bring the total loss of acute care beds within the system to 5,100 since 1980.

In our view, the continual shutdown of beds, wards and certain sections of VA hospitals is a waste of resources. Considering the current demand on the system for nursing home care, and the rate at which new nursing beds are being added to the system, we think that more attention should be directed toward the possible conversion of beds already closed in the system to nursing care units.

Further, in view of the ever-increasing number of closures of acute care beds, we think that the Committee should give serious consideration to amending Section 108 of Public Law 97-72 to establish a minimum number of acute care beds which shall be available within the VA health care program. In our view, the continual shutdown of acute care beds will relegate the medical care program to a caretaker system for elderly veterans.

Our concern, Mr. Chairman, centers around the acute care needs of the elderly veteran, of course, but what of the similar needs of the more than eight million Vietnam Era veterans whose average age by the year 2000 will be 53 years?

CONVERSION

While the VA is, according to testimony previously presented to this Committee, considering the conversion of a few acute care beds within hospitals, their plan is directed more at "change of missions" -- conversions of entire hospitals.

Mr. Chairman, appended to my statement is an article which appeared in the January 13, 1983 edition of the New England Journal of Medicine entitled, "Why Acute-Care Hospitals Must Undertake Long-Term Care." In their treatment of the subject, the authors point out:

> Acute care hospitals should re-orient their patterns of care. Unlike other providers, hospitals could offer comprehensive case management of patients, from home care to acute care, thus insuring continuity of services. Pilot projects, such as the Urban Medical Group in Boston, have shown that a comprehensive approach to caring for the chronically ill elderly can be cost-effective. Hospitals could most readily provide the physician care needed to eliminate the costly shuttle from nursing home to acute care facilities. Moreover, hospitals with long-term care beds would have a tremendous incentive to use those beds preferentially for patients requiring long-term care, particularly those inappropriately and expensively occupying acute care beds.

Mr. Chairman, the DAV will not, in every instance, oppose the VA's plans to change the missions of certain VA hospitals. However, our support will be predicated upon the proper maintenance of acute care beds in the system, a continued commitment to outpatient care, and the utilization (conversion to extended care) of beds already closed in the system.

MEDIPP

A little over a week ago, Mr. Chairman, the various veterans' organizations were briefed on the VA's Medical District Initiated Program Planning (MEDIPP) effort. As we understand it, MEDIPP is a model on which the VA plans to assess its future needs based upon a medical district perspective and the shift in veteran population.

Similar to the VA's current five-year plan, the goal of MEDIPP seeks to:

establish a health care delivery plan which views all facilities within a district as a part of a district-wide system;

make the most effective use of all available resources;

provide for the distribution of health care services among facilities within a district so that eligible veterans can receive all necessary care within a district; and

provide a valid base on which to propose necessary changes to achieve these and other goals.

While the DAV disagrees with the guidance provided to each Medical District concerning the bed sizing model and veteran population statistics, we support the VA's overall effort to allow the districts to individually determine their needs and provide suggestions on the most effective utilization of their facilities.

VA officials at Central Office are currently studying the recommendations from the 26 Medical Districts and have made no final decisions. However, we believe that the input from the local stations will assist the VA in future planning of:

* Adjustments in services to a level of need based on veteran population;

* Conversions of unused and under-utilized beds to extended care beds;

* Alternatives to institutional care;

* Adjustments in construction to meet the level of need of veteran patients.

In addition, the process will:

* Strengthen the decision-making process within the Department of Medicine and Surgery;

* Enhance communications between VA Central Office and local field stations; and

* Provide an opportunity for veterans' organizations and veteran patients themselves to participate in the formulation and review of plans.

Considering some of the proposed recommendations contained in the MEDIPP plan, we believe the model will serve as an effective tool in assessing the future needs of the VA health care program. Short of an endorsement, Mr. Chairman, the DAV supports the VA's efforts to make the most cost-effective use of the resources and funding available to it.

THE PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL

Mr. Chairman, the DAV has recently obtained a draft copy of the President's Private Sector Survey on Cost Control, which makes several recommendations regarding the VA's Medical Construction Program. The Task Force of Federal Hospital Management, in their segment entitled "The Veterans Administration Health Care Facility Construction Program," makes, among others, the following conclusions and recommendations:

Conclusions:

1. Convert under-utilized medical, surgical and psychiatric beds in VA hospitals into nursing care beds;
2. Contract with the private sector for any additional beds needed; and
3. Simplify and streamline the extraordinary policies and procedures of the VA Construction Program.

Recommendations:

1. The VA should stop the construction of nursing beds and convert thousands of under-utilized beds to extended care;
2. Private nursing home operators should be contracted to build and operate nursing homes in cities where VA beds are needed; and
3. The Office of Construction should be reorganized.

Although there are other recommendations contained in the survey, Mr. Chairman, we believe the VA's effort with respect to MEDIPP meets many of the Task Force concerns. Without commenting specifically on the conclusions and recommendations regarding the Office of Construction, the VA has recently begun to focus on the possible conversion of beds within the system. While we believe the VA should give closer attention to this issue, the information appended to my statement together with the possible change in missions for certain VA hospitals alluded to in the MEDIPP model, clearly shows that the Department of Medicine and Surgery is considering such plans.

However, Mr. Chairman, we strongly disagree with the Task Force recommendation that the VA should stop building nursing homes and contract with private operators to build and operate new nursing facilities. Rather, we favor a plan which provides for both the conversion of beds and construction of new facilities. In this fashion, the VA can meet its current demand for nursing home care brought about by the aging World War II veteran population and meet its future needs to provide overall health care to Vietnam Era veterans.

Although the number of veterans over the age of 65 is expected to decline after the year 2000, in just thirty years from now, Mr. Chairman, the figure will increase again as over eight million Vietnam Era veterans reach 65 years of age. In our view, the commitment to provide care to these veterans is a responsibility of the VA that should not be abrogated -- thus requiring this group of veterans to fend for themselves in their advanced years.

SUMMARY

In summary, Mr. Chairman, the DAV supports full funding of the VA's Fiscal Year 1984 request for its health care construction program. We support a program which calls for the conversion of beds already lost to the system within VA hospitals and the continued commitment of the VA to meet the health care needs of all veterans of all age groups. We believe that the acute care beds available in the system are dangerously low and that every effort should be made to maintain the current level of acute care beds with an eye toward increasing these numbers in the years ahead. Finally, while the DAV supports the conversion of many of its unused beds, we do not favor VA contracting of its responsibility to provide overall health care to all segments of the veteran population.

This concludes my statement, Mr. Chairman, and I again wish to thank you and the members of the Committee for allowing us this opportunity to present our views on this very important subject.

* * *

SPECIAL ARTICLE

WHY ACUTE-CARE HOSPITALS MUST UNDERTAKE LONG-TERM CARE

EDWARD W. CAMPION, M.D., AXEL BANG, AND MAURICE I. MAY, M.S.H.A.

FROM 1970 to 1980 the elderly population (those over age 65) grew by 14.8 per cent in Massachusetts and by 27.3 per cent in the country as a whole. The population over the age of 85 — 22 per cent of whom are institutionalized in the United States — grew by 53 per cent in the state and by 48 per cent in the United States.[1] This "graying of America" promises to continue (Table 1) and will radically change the future patient mix in acute-care hospitals. By 1978 the elderly accounted for more than 48 per cent of patient-days in Massachusetts acute-care hospitals, and this percentage is rising (Table 2).[2]

STRAINS ON THE SYSTEM

Although the patient mix has changed, patterns of care have not. Hospitals have continued to increase the intensity of services to a point that has become distinctly uncomfortable economically and politically. Only now are acute-care hospitals beginning to broaden their philosophy of care to incorporate the long-term medical, rehabilitation, and social needs of the elderly. There are multiple barriers to hospitals' shifting into long-term care, not only in reimbursement but also in the traditional patterns of teaching and practicing medicine in acute-care institutions. Despite these barriers, we believe that acute-care hospitals should move into the field of long-term care and that such a shift will result in improved delivery of health care to the elderly and in more efficient use of health resources.

Acute-care hospitals are currently feeling the consequences of severe economic difficulties experienced by the traditional providers of long-term care: chronic-care hospitals, mental-health hospitals, nursing homes, and home health agencies. The result is a burgeoning number of chronically ill elderly who do not seem to fit into any level of care. These elderly are becoming the "boat people" of the health-care delivery system. On any given day in Massachusetts 823 elderly patients[3] who do not need hospitalization are nevertheless occupying beds in acute-care hospitals, while awaiting placement. Annually, such patients account for over 300,000 patient-days in this state alone. This placement bottleneck can be attributed to the large number of patients with needs greater than nursing homes can meet and to the virtual freeze on nursing-home construction across the country.[4] The shortage of nursing-home beds is tied to problems that pervade the elderly-housing market and the home-health-care system. Although it is estimated that 15 to 40 per cent of the elderly in nursing facilities could be more appropriately cared for in private homes,[5] most no longer

From the Geriatrics Unit, Massachusetts General Hospital, the Massachusetts Rehabilitation Hospital, the Division on Aging, Harvard Medical School, the Hebrew Rehabilitation Center for the Aged, Boston; and the Massachusetts Hospital Association, Burlington, Mass. Address reprint requests to Mr. Bang at the Massachusetts Hospital Association, 5 New England Executive Park, Burlington, MA 01803.

Table 1. Selected Data from the 1980 U.S. Census of Population.[1]

Age	Massachusetts Population			United States Population		
	1970	*1980*	*% change*	*1970*	*1980*	*% change*
0–14	1,567,823	1,173,281	−25.2	57,899,831	51,282,460	−11.4
15–64	3,485,162	3,837,225	+10.1	125,246,593	149,678,232	+19.5
65–74	381,011	422,615	+10.9	12,435,456	15,577,586	+25.2
75–84	203,724	230,008	+12.9	6,119,145	7,726,826	+26.3
>65	632,943	726,531	+14.8	20,065,502	25,544,133	+27.3
>85	48,208	73,908	+53.3	1,510,901	2,239,721	+48.2
Total	*5,685,928*	*5,737,037*	*+0.9*	*203,211,926*	*226,504,825*	*+11.5*

have a home, are entirely alone in the world, or are ineligible for home-care services. Home health care has traditionally been a low priority of Medicaid and Medicare, receiving less than 2 per cent of those budgets. In Massachusetts there are also 34 long-term-care hospitals with 6452 beds. Regulators are currently attempting to close some of these hospitals or convert them to nursing homes.[6] If they succeed, even more elderly patients in need of extensive care will become long-term residents in acute-care hospitals.

The problems exemplified in Massachusetts are national in scope. The American Hospital Association has recently established an office on aging and long-term care to "help hospitals face the challenge of adapting to meet the needs of their older patients and others with chronic conditions." In 1981, in response to these pressures, the Massachusetts Hospital Association established a multidisciplinary task force on long-term care to examine the role of hospitals in meeting future long-term-care needs. The report of the task force provides the framework for this article. Although we were members of the task force, the opinions expressed here are our own. Our principal conclusion and that of the task force is that acute-care hospitals must move to undertake long-term care.

THE NATURE OF NURSING HOMES

Since the advent of Medicare and Medicaid in 1965, the nursing home has become the centerpiece in the long-term-care system in the United States. There are 1.3 nursing-home beds for every acute-care bed in the United States. Eighty-six per cent of nursing-home residents are over 65, and about one quarter of all elderly Americans will spend part of their life in a nursing home.[7] The growth in nursing homes has been accompanied by increasing concern about their impact on residents. Once in a nursing home, the elderly generally become physically, emotionally, and economically dependent on the home for the rest of their lives. After only a few months in the home, most residents have used up their personal savings; they have become impoverished and are entirely dependent on Medicaid. Eighty per cent of nursing-home beds are occupied by patients receiving Medicaid, according to the Massachusetts Federation of Nursing Homes. Discharge is usually impossible for these people even if their health improves, since they have no means of support in the outside community. Coordinating successful community discharges for these vulnerable persons is a complex, time-consuming, and risky task. Moreover, at present there are no financial incentives for nursing homes to do so. Knowing this, nursing-home staff do not emphasize — and cannot afford to emphasize — rehabilitation and community placement.

Table 2. Six-Year Trend in Days of Care for the Elderly (>65 Years) as a Percentage of Total Days of Care for All Patients in Acute-Care Hospitals in Massachusetts.*

Source of Data	Days of Care for Elderly (% of Days of Care for All Patients)					
	1974	*1975*	*1976*	*1977*	*1978*	*1979*
Massachusetts Hospital Association	41.6	43.1	46.3	46.3	48.4	—
Massachusetts Department of Public Health	—	—	—	49.7	51.4	50.9

*The data for these two time series were obtained from different sources and thus differ slightly, although they show the same trend. The data from the Massachusetts Department of Public Health are from a survey of most hospitals in Massachusetts, whereas the Massachusetts Hospital Association data represent actual discharges from representative hospitals.

Nursing homes have also become a repository for psychiatric patients, drastically changing the nature of care in many homes. A 1981 report by the Blue Ribbon Commission on the Future of Public Inpatient Mental Health Services in Massachusetts stated that 10 per cent of nursing-home residents were admitted from psychiatric facilities, and another 24 per cent were classified as having mental illness (excluding dementia), mental retardation, or major behavioral problems. The influx of mental-health patients results from the closure of three large psychiatric facilities, with a drop in the state mental-health inpatient census from 14,500 in 1967 to 2100 in 1981.[8] The Massachusetts experience exemplifies the national situation.[9]

Policy makers see an urgent need for more nursing-home beds despite the difficulties of financing and controlling access. Report 36 (January 1981) from the Massachusetts Department of Public Health's Determination of Need Office shows a need for 7300 more nursing-home beds in the Commonwealth by 1985. However, the growth of nursing homes is stalled, because present state reimbursement policies make capital financing and ownership economically unattractive in this predominantly for-profit industry. There has been a net increase of only 961 beds in the past five years, and few new homes have been scheduled for construction. Nationally, there is also an effective freeze on nursing-home construction, coupled with restrictive Medicaid reimbursement. It is not only the shortage of nursing-home beds that backs up patients in acute-care hospitals. Because of the economic incentives of nursing homes, the elderly patients who require more attention are kept in acute-care hospitals. Patients who require minimal care and thus little staff attention are more attractive economically, and privately paying patients are most attractive of all. An astonishing absence of physician involvement in nursing homes further discourages acceptance of patients who require extensive care and are dependent on Medicaid.

There are broader societal changes that contribute to the pressure to institutionalize the elderly. Increasing numbers of women are joining the work force, reducing the number of women who can care for elderly relatives at home. Family size is also declining. Mobility in the work force has created a geographic separation of children from parents, making care logistically difficult. The increases in the divorce rate and in the number of single-parent families have further complicated familial care of the elderly. Moreover, progressive inflation has eroded the savings and pensions of the elderly, diminishing their capacity to remain economically independent in the community.

The Challenge for Hospitals

Unarguably, the hospital has stood as the primary point of contact in the community for meeting the acute health-care needs of the elderly. It remains virtually the only community institution that is open 24 hours a day, 7 days a week, to provide emergency care and social and rehabilitation services. This is important to the elderly, who are more vulnerable to illness, stay longer in hospitals, and are admitted more frequently than other age groups. In 1978 persons over age 65, representing 12 per cent of the Massachusetts population, accounted for 28 per cent of hospital discharges.[10] The average length of stay in Massachusetts acute-care hospitals was 6.9 days for patients under 65, 12.5 days for those aged 65 to 75, and 14.5 days for those over 75.[11] Elderly patients are readmitted more frequently in the course of a year, and a small percentage of them accounts for a disproportionately large number of patient-days.[12] For the country as a whole, data from the Health Care Financing Administration indicate that 70 per cent of annual expenditures are used to care for a mere 8.8 per cent of Medicare beneficiaries.[13]

In spite of the large numbers of elderly patients in acute-care hospitals, most of these institutions have no comprehensive geriatric program geared to the long-term medical, rehabilitative, and social needs that are linked to acute illness. To provide quality care, hospitals must make a commitment to long-term care for the chronically ill elderly patient. It is becoming apparent that no one else will or can.

If hospitals were to provide more long-term-care services, fundamental changes in the hospital environment and in reimbursement would be required. Acute-care hospitals lack areas where patients can congregate for meals or for recreational and social activities. The rapid turnover of patients in acute-care hospitals is unsettling to older persons, who need stability, patience, and friendship. Hospital staff have not been trained to care for the long-term needs of the elderly. In the acute-care hospital environment rampant testing and ancillary procedures can result in the "overmedicalization" of patients and can exacerbate the problem of escalating health-care costs. An option for acute-care hospitals would be to develop long-term-care units specifically for such elderly patients. In Massachusetts, however, the state rate-setting commission has developed reimbursement methods that prevent hospitals from operating long-term-care units. If these methods were changed so that the costs of long-term care could be isolated from overhead for acute care a long-term-care unit would be economically viable. Recent federal regulation that permits small rural hospitals to operate "swing beds" for chronic care is a move in this direction.

Acute-care hospitals should reorient their patterns of care. Unlike other providers, hospitals could offer comprehensive case management of patients, from home care to acute care, thus ensuring continuity of services. Pilot projects, such as the Urban Medical Group in Boston, have shown that a comprehensive approach to caring for the chronically ill elderly can be cost effective.[14] Hospitals could most readily provide the physician care needed to eliminate the costly shuttle from nursing home to acute-care facility. Moreover, hospitals with long-term-care beds would have a tremendous incentive to use those beds preferentially for patients requiring long-term care, particularly those inappropriately and expensively occupying acute-care beds.

Using existing sources of state, federal, and foundation funding, hospitals could coordinate or sponsor a wide array of institutional and community services for the elderly: congregate housing; nursing-home, day, home, foster, hospice, and "respite" care (care to offer a respite for those providing care at home); meals on wheels; and health education and screening. Some of these services, such as nursing-home care, day care, and home health care, are supported by Medicaid in Massachusetts; a smaller number are reimbursable by Medicare. To limit their liability and protect themselves financially, some hospitals are reorganizing their corporate structures and creating holding companies to oversee such programs.

The financial risks of providing community and long-term care are smaller than hospitals fear. Already 15 Massachusetts hospitals have certified home health agencies. Nationally, private entrepreneurs continue to find the $21 billion nursing-home industry profitable, though largely by catering to private payers, who contribute $7.5 billion to the industry.[15] With efficient management, quality nursing-home care is possible. Hospitals could also take unique advantage of economies of scale. Most important, only acute-care hospitals could reap additional economic benefits from a more efficient use of acute-care beds.

Hospitals are becoming increasingly cognizant of the long-term-care system, simply because their economic survival may depend on it. As cost-control efforts put the pinch on nursing homes, the acute-care hospitals will feel the squeeze. Severely impaired, hard-to-place elderly patients account for most "administratively necessary days" for which hospitals have been paid less than the full per diem rate. The growing numbers of such patients threaten the financial viability of some hospitals.

The financial benefits deriving from long-term care will become particularly appealing to acute-care hospitals if the trend toward prospective reimbursement continues. With hospitals held directly liable for cost control, comprehensive management of the patient requiring extensive care in a long-term unit or at home becomes cost effective. For example, the physician's home visit currently appears to be costly and inefficient. However, as part of a comprehensive system of health care for the elderly, home visits would be recognized as an effective means of providing high-quality, low-technology care that would also prevent expensive institutionalization. Only hospitals have the knowledge and incentives to direct such resources to the elderly who are truly at risk for costly hospitalization.

Acute-care hospitals are finding themselves stumbling into long-term care with no clear strategy.[16,17] To ameliorate the problem, some have established closer ties with local nursing homes by providing in-service education, consultation, and even medical coverage. Some hospitals have actually become long-term-care facilities, entirely or in part. Others have developed close administrative ties to local nursing homes as a means of gaining influence in decisions concerning bed use and patient transfers. A few large hospitals have simply and quietly purchased nursing homes and now run them. The objective of all these activities by acute-care hospitals is to gain greater access to long-term-care beds.

The lack of access to long-term care creates dangerous pressures on administrators and physicians to manipulate the utilization-review process or even patient care in order to keep patients defined as acutely ill and thereby covered by Medicare. Exposed to this small group of severely impaired patients in teaching hospitals, residents and medical students may acquire a distorted and pessimistic view of aging, entirely losing sight of the fact that 95 per cent of the elderly reside at home.[18]

As acute-care hospitals assume responsibility for long-term care, they must become more effective agents in preventing institutionalization of the elderly at risk. This means moving decisively into community geriatric care, which is currently a tangled array of medical, social, and economic services badly in need of coordination. Hospitals have learned that crisis and collapse in any of these community services may result in increased numbers of hospital admissions, long-term institutionalization, and increased costs.

More effective preventive interventions will take hospitals far beyond their traditional roles and into comprehensive community screening and delivery of services. The homebound and severely impaired elderly make up the group that private practitioners and group practices find most difficult to care for because of the attendant social needs, logistic difficulties, and low financial reimbursement. Hospitals and their affiliated community clinics are best equipped to care for such patients, coordinating the complex services and providing round-the-clock social and medical support. At present, not even the structure of prepaid health-maintenance organizations creates strong incentives to prevent nursing-home institutionalization, since, like most other health insurers, health-maintenance organizations do not cover long-term nursing-home care. The costs of such care fall to the individual members and are therefore outside the utilization strategies of the health-maintenance-organization plan. Strategies for a truly comprehensive "social health maintenance organization" are only now being proposed.[19] The first steps toward provision of total care for the homebound elderly are being taken in experimental federal programs, such as the one at St. Vincent's Hospital in New York City.[20]

A further stimulus for hospitals to move into long-term care is the projection that this will be the greatest growth area in health care over the coming decades.[21] The budgets of nursing homes are projected to reach $76 billion within this decade.[22] New explorations in federalizing Medicaid and shifting Medicare resources toward long-term care are perhaps clues that future control of total federal allocations for health care may be gained primarily at the expense of the acute-care sector.[23] If hospitals remain devoted solely to acute care and if the pressures to reduce use persist, these hospitals may soon be delivering extraordinarily expensive care to a very small fraction of the populace. Moreover, if they do not begin to move into long-term care, acute-care hospitals may find themselves at the mercy of the growing and tightly organized for-profit nursing-home chains.

The resources, power, research skill, and versatility of acute-care hospitals are crucially needed by the growing and changing long-term-care system. The greatest resistance to hospitals' moving in this direction comes from health-care planners who fear that hospitals will "medicalize" the long-term-care system, bringing expensive, high-technology procedures into what should remain a low-technology system of care. That view may well reflect a problem in the identity of hospitals, which have become so wedded to technologic interventions that they have difficulty recognizing long-term-care as an important and valued challenge. The demographic and economic realities described in this paper may force a form of identity crisis on acute-care hospitals. That process could be painful, but it could also put hospitals in closer touch with their own historical mission of supporting and caring for the elderly and chronically ill.

REFERENCES

1. The 1980 United States census data for Massachusetts. Boston: Massachusetts Hospital Association, 1982.
2. Report of the Task Force of Long-Term Care. Boston: Massachusetts Hospital Association, December, 1981.
3. Administrative day survey. Boston: Massachusetts Department of Public Welfare, September 22, 1981.
4. Government Accounting Office report IPE-82-4. July 15, 1982.

PVA
PARALYZED
VETERANS
OF
AMERICA
CHARTERED BY THE CONGRESS OF THE UNITED STATES

PREPARED STATEMENT OF R. JACK POWELL, EXECUTIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. Chairman and Members of the Committee, Paralyzed Veterans of America appreciates this opportunity to express its views on the Veterans Administration's medical construction program. PVA's members are all veterans who have experienced spinal cord injury or dysfunction. These veterans have considerable contact with the VA health-care system and the facilities in which the VA extends medical and health-care services.

Additionally, PVA is equally as grateful to offer its views on possible judicial review in federal courts of veterans' claims, whenever the

801 Eighteenth St., N.W., Washington, D.C. 20006 (202) USA-1300

individual veteran chooses to present his case to a court after exhausting his administrative remedies.

PVA's statement will concentrate first on the VA's medical construction plan. Then, it will address judicial review.

In looking at VA medical construction, this testimony is structured as follows: first, it will examine the VA's construction plans, generally. Second, it will look into the specific needs of spinal cord injured veterans and examine some possible VA construction projects which would help ensure more adequate care for spinal cord injured (SCI) veterans. This latter part will occupy most of this testimony because PVA, as the only veterans' service organization dedicated to representing spinal cord injured veterans, considers it necessary that this Committee be informed of the needs of SCI veterans. As will be discussed in depth later, the construction projects identified in this testimony are urgently needed.

It is worth noting that some of PVA's comments dedicated to the VA construction program are intended to actually save the government money. Under existing circumstances, the VA must provide SCI veterans with care which is actually more expensive and less appropriate than what is needed by such veterans. These cost-saving measures are aimed at providing SCI veterans with appropriate and timely care, which is PVA's foremost goal; however, this care can sometimes be done in a less expensive manner than is now being utilized.

Before examining the construction needs of the VA's Spinal Cord Injury Service, PVA would like to address a few points of serious but general concern. First, we remain very concerned that over a year ago the VA implemented a revalidation study but no official results of this study have been made readily available. This study was intended to examine the demographics of the veteran population in an effort to ensure that the types of care which veterans require are provided. Furthermore, the study was to result in the accurate geographic placement of VA health and medical facilities so that they would optimally meet the needs of veterans and at the same time prevent the wasteful expenditures for the construction of unnecessary VA facilities.

When the revalidation study (and the corresponding freeze on VA medical construction projects pending review) was announced, PVA offered its qualified support. We agreed that accurate placement of facilities was one of our major concerns. However, we insisted that the freeze on construction planning must not be just a guise for cutting expenditures that are to be made on behalf of the nation's veterans. In the absence of a final study, PVA questions the validity of spending VA funds in the conducting of these studies. Furthermore, if no true revalidation was conducted, this exercise must be regarded as only an expensive delaying tactic, whereby expenditures for medical construction projects have been delayed while construction costs have risen.

PVA is also concerned over a statement which appears in the most recent VA Five-Year Construction Plan, that for Fiscal Years 1983-1987. In that plan is a discussion of the VA's new Medical District Initiated Program Planning

(MEDIPP), a procedure which is likely to improve the VA's medical facility construction planning process. However, at page iv of the Five-Year Plan there appears the statement that "it is anticipated that the MEDIPP process will provide for revalidation of project needs on an annual basis by directly relating construction requirements to the delivery of services." PVA believes that it fully understands the processes to be used in MEDIPP, but we fail to distinguish how the results of this yearly review will differ significantly from the present one. Under the existing system, the Department of Medicine and Surgery repeatedly recommends the construction of needed projects, but these needs-based recommendations are often ignored. PVA trusts that the annual revalidation under MEDIPP will not prove to be as disruptive as has the most recently implemented revalidation effort, which was discussed above. In short, the new planning process must not become a bureaucratic maze nor a stalling mechanism, and revalidations must not be allowed to further complicate nor hinder the VA's construction process.

A second area which PVA would like to address is the current efforts by Congress and the Administration to expand employment opportunities by having unemployed Americans work on federal projects. There is a growing concern in Congress and the Administration over the plight of the unemployed citizens of this country, a concern which PVA shares. And, there is also serious consideration being given to stabilizing many of our decaying structures such as highways, bridges, and mass transit systems. PVA, again, agrees that some of our nation's most important and prized accomplishments must not be allowed to deteriorate further.

VA health-care facilities, like the interstate highway system, are part of the nation's assets and both were designed to contribute to the national defense. The interstate highway system was intended to allow rapid mobilization in times of national emergencies; VA hospitals were meant to care for the men and women who have answered the nation's call to service during times of crises.

It would not be inconsistent with the aims of a restoration/employment measure to include VA facilities as objects for repair, and it would be giving needed attention to the urgent situation which surrounds many VA facilities. Too many such structures are being allowed to deteriorate even though their assigned purpose is to care for the increasing number of veterans who stand in need of health and medical services.

The Brockton, Massachusetts, VA Medical Center is an example of the decay which PVA has observed within the VA health-care system: the situation at Brockton has existed for a number of years and continues to worsen. Quite briefly, the Spinal Cord Injury Center there is in urgent need of renovation. And, it is filled to capacity while other SCI veterans await admission. Yet, in the face of these facts the Veterans Administration speaks of reducing SCI beds in that facility, largely because of the facility's poor condition and the major renovations which would be required to make the SCI facility truly operative.

Admittedly, the Brockton VAMC's Spinal Cord Injury Center is a particularized example of the type of decay which PVA has seen occur within the VA's medical and health-care facilities. But, it represents one of the grandest, most innovative fields of care for which the VA is known, because the VA has led the nation in development of spinal cord injury care. Nonetheless, even that noble venture is being allowed to deteriorate due to economic difficulties and fiscal policies.

Numerous VA facilities need prompt attention, and many, such as Brockton, are located in geographic areas where capable workers are unemployed. At a time when the nation seeks to restore national assets, to revive the productivity of its workers, and to strengthen the national defense, it is only reasonable that VA medical and health-care facilities be provided for in any restoration/employment measure created by this Congress. PVA would support any reasonable measure which included this provision.

In addition to these restoration projects, PVA has heard the Director of the Office of Management and Budget state that the Administration may seek to accelerate the construction of new VA medical facilities that are needed and which are provided for in future years' budget projections. PVA assumes that this, too, is a measure aimed at increasing employment opportunities and at meeting the VA's needs in a more timely manner.

PVA supports the acceleration of new construction projects which have already been identified as required by the Veterans Administration. Later in this paper is a discussion of one such project, a long-term SCI care facility at the Hines VA Hospital in Hines, Illinois: PVA feels that this project clearly should be considered if there is a program of accelerated construction. As will be seen later, in the longer discussion of the situation which exists at Hines, the VA's medical experts have long agreed with PVA that construction must begin soon if the needs of SCI veterans in that geographic area are to be met.

Mr. Chairman and Members of the Committee, PVA trusts that you will work actively to have the renovation and construction of VA medical and health-care facilities included as part of the federal infrastructure which is to receive needed attention. Above are but two examples of VA facilities which stand in need of such consideration, and one would benefit from restoration and the other from accelerating the VA's construction program. Now is the time for Congress and the Administration to act, it appears to PVA, if the Veterans Administration's Department of Medicine and Surgery is to remain a viable provider of services to the nation's veterans.

Whether there is a sudden change in the construction process, or whether the VA continues as it has in the past, there are certain requirements of the VA's Spinal Cord Injury Service which must be addressed. These particularized requirements too often have been ignored in the past. However, there is now available new information upon which the VA can accurately plan the construction of SCI acute- and long-term care projects.

This newly-acquired data will be explained in some detail in the following pages, and the remainder of this testimony is dedicated to examining the needs of the SCI Service. The methodology used by the VA and PVA in gathering this information was very similar to that which was to be used in the revalidation studies to locate the appropriate sites for placement of VA health and medical facilities.

The examination of the requirements of the VA's SCI Service is presented in four sections: Section A will summarize the demographics of SCI veterans and how the needs of this group of veterans are different from those of veterans in general. Section B will discuss briefly, based on these demographics, the need for constructing new acute-care SCI Centers in the Southwest. The SCI bed. shortage in Texas, for example, has already reached alarming levels.

Section C will explain the need for long-term care SCI facilities, and noted specifically is the absence of suitable facilities in Tampa, Florida, Houston, Texas, and Hines, Illinois. Finally, Section D will offer suggested supplements to VA construction projects, as the VA seeks to care for the needs of SCI veterans who reside in thinly settled regions of the nation where the construction of SCI Centers is not economically feasible.

Admittedly, this testimony goes into some depth in its analysis of the construction requirements of the VA health-care system, as that system serves SCI veterans. However, SCI veterans are some of the most severely disabled persons who have rendered service to the nation; therefore, PVA strongly believes that an in-depth examination of their needs should be made at this time.

Part I. VA MEDICAL CONSTRUCTION PROJECTS

Section A. Demographics of SCI Veterans and of the VA Health-Care System

The Spinal Cord Injury Service that was created in 1954 had 11 Spinal Cord Injury Centers in VA medical centers throughout the nation. Since then, the SCI Service has expanded to only 19 Centers, the most recently constructed Center opening in January of 1981 at the Augusta VA Medical Center in Georgia.

In an effort to continue the VA's advancements in SCI care, PVA's Research Program has been working with Dr. Juan Fonseca, VA Director of SCI Service. One of our mutual projects has been the development of current information on the SCI veteran population. PVA feels that this is a quite comprehensive study of SCI veterans. It should meet the methodology requirements which the Veterans Administration has established for analysis of veterans as users of VA medical and health-care facilities and services. Therefore, it would appear that progress could be made at this time toward meeting many of the construction requirements of the Spinal Cord Injury Service.

Any demographic study of people generally begins by showing where they are located geographically: one finding which distinguishes SCI veterans from the general veteran population is the distribution of these identifiable veterans. The top ten states of residence of SCI veterans, compared with that of the general veteran population, are listed below:

Veterans' Top Ten States of Residence

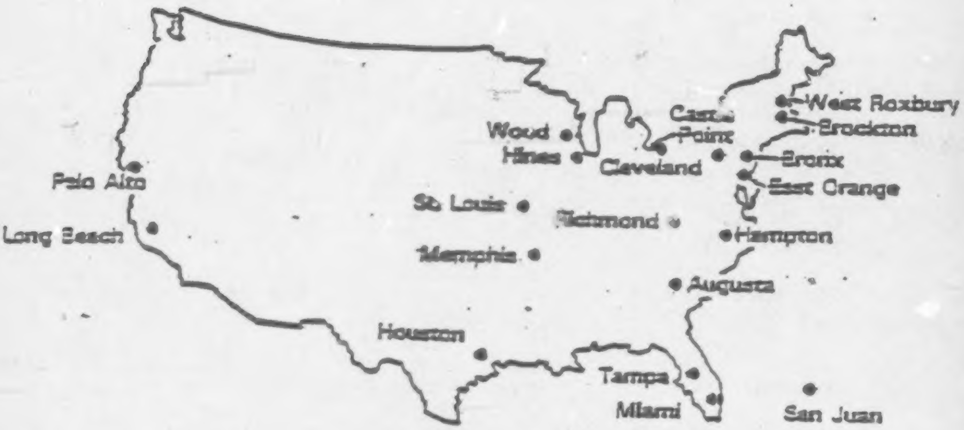
SCI RESPONDENTS		GENERAL VETERANS POPULATION	
California	10.0%	California	11.2%
Florida	6.8%	New York	8.1%
Texas	5.9%	Pennsylvania	5.8%
New York	5.6%	Texas	5.5%
Pennsylvania	4.9%	Illinois	5.1%
Ohio	4.9%	Ohio	4.9%
Michigan	3.2%	Florida	4.5%
Illinois	3.0%	Michigan	3.9%
Massachusetts	3.0%	New Jersey	3.7%
Wisconsin	2.6%	Massachusetts	2.9%

More accessible buildings and warmer weather have caused many spinal cord injured veterans, in proportions which exceed the general veteran population, to move to the "Sunbelt States." These States also seem to offer desirable transportation, employment, and recreation facilities These factors cause PVA to believe that this geographic area will continue to see in-migration of SCI veterans.

The VA, at this time, is showing an unprecedented interest in the accurate placement of its health-care facilities. Therefore, as the VA considers appropriate locations for SCI veterans, special consideration must be given to these settlement patterns, and the VA should not rely on general veterans population statistics in making such decisions.

In understanding the importance of this demographic information and that which will follow, it would be helpful to review a map of the United States on which the location of VA SCI Centers is noted:

Location of VA SCI Centers


Palo Alto
Long Beach
Wood
Hines
St. Louis
Memphis
Houston
Cleveland
Castle Point
Richmond
West Roxbury
Brockton
Bronx
East Orange
Hampton
Augusta
Tampa
Miami
San Juan

In addition to these SCI Centers, there is an SCI Service-approved out-patient clinic at Sepulveda, California.

Furthermore, there are two out-patient clinics which care for SCI patients but which are not officially part of the SCI Service. They are located in Phoenix, Arizona, and Indianapolis, Indiana. These two clinics are headed by nurse practitioners who have been trained in the special needs of SCI patients.

All three SCI out-patient clinics have proven to be very effective and beneficial: they have helped reduce the load being placed on SCI Centers, or they are filling the void where there are numerous SCI veterans but there is no convenient SCI Center to care for their needs.

These nineteen SCI Centers are hard-working facilities dedicated to serving SCI veterans, as the following distribution of discharges of in-patients reveals:

Distribution of In-Patient Discharges of SCI Veterans From the VA's SCI Centers and from All VA Medical Centers Fiscal Year 1976-Fiscal Year 1982

		BEDS	N	%	%'
1.	Memphis	160	5109	13.93	7.37
2.	Long Beach	197	4528	12.34	6.54
3.	West Roxbury	100	4105	11.19	5.93
4.	Richmond	145	3891	10.61	5.62
5.	Wood	56	2732	7.45	3.94
6.	Tampa	42	2101	5.73	3.03
7.	Palo Alto	30	2074	5.66	2.99
8.	Hines	135	1816	4.95	2.62
9.	Castle Point	58	1509	4.11	2.18
10.	Miami	37	1386	3.78	2.00
11.	Houston	22	1343	3.66	1.94
12.	Cleveland	60	1329	3.62	1.92
13.	St. Louis	32	995	2.71	1.44
14.	San Juan	20	875	2.39	1.26
15.	Bronx	80	790	2.15	1.14
16.	Hampton	22	639	1.74	.92
17.	East Orange	36	623	1.70	.90
18.	Brockton	58	435	1.19	.63
19.	Augusta	60	395	1.08	.57
	Totals	1350	36,675	100.00	52.94

N - Number of Discharges

% - Percentage of Discharges from SCI Centers

%' - Percentage of Discharges from all VAMC's, which means that nearly half (47.06 percent) of all SCI discharges were made by non-SCI facilities.

It is not necessary in a testimony of this nature and short length to list all 153 non-SCI facilities within the VA and the number of discharges they made over a significant period of time. However, thirty such facilities made over 400 discharges each between Fiscal Year 1976 and Fiscal Year 1981:

Discharges of SCI Veterans from VA Non-SCI Facilities
Fiscal Year 1976-Fiscal Year 1982

1.	Dallas	774
2.	Portland	735
3.	Minneapolis	683
4.	Ann Arbor	679
5.	San Antonio	637
6.	Seattle	612
7.	Little Rock	611
8.	Phoenix	603
9.	Birmingham	558
10.	Charleston	560
11.	Durham	519
12.	Indianapolis	514
13.	Atlanta	513
14.	Oklahoma City	503
15.	Denver	499
16.	San Diego	496
17.	Columbia, SC	488
18.	Louisville	482
19.	Shreveport	476
20.	Jackson	471
21.	Temple	467
22.	Lexington	453
23.	Pittsburgh (Aspinwall)	451
24.	New Orleans	428
25.	Gainesville	427
26.	Kansas City	426
27.	Nashville	424
28.	Albuquerque	416
29.	Cincinnati	412
30.	Allen Park	407

Nine other non-SCI facilities made at least 300 SCI discharges, each, during this same time period, and twenty-four such general facilities made at least 200 SCI discharges each. In all, there were 32,603 SCI in-patient discharges made by non-SCI facilities during these six years.

It is also meaningful to illustrate the number of SCI discharges by VA medical district and region, and the following table contains this useful information:

Discharges of SCI In-Patients by Medical Districts and Regions
Fiscal Year 1976-Fiscal Year 1981

DISTRICTS	NUMBER OF DISCHARGES			REGIONS	
	N	%		N	%
1	5,432	7.94	(BROCKTON, WEST ROXBURY)	#1 - 10,464	15.10
2	1,029	1.49			
3	4,003	5.78	(BRONX, CASTLE POINT, SAN JUAN)		
4	1,378	1.99	(EAST ORANGE)	#2 - 9.392	14.28
5	952	1.37			
6	998	1.44			
7	5,097	7.36	(HAMPTON, RICHMOND)		
8	1,467	2.12			
9	2,196	3.17	(AUGUSTA)	#3 - 16,630	24.00
10	1,713	2.47			
11	6,496	9.38	(MEMPHIS)		
12	4,336	6.26	(MIAMI, TAMPA)		
19	1,889	2.73			
13	2,115	3.11	(CLEVELAND)	#4 - 11,339	16.37
14	1,338	1.93			
15	756	1.09			
16	3,285	4.74	(WOOD)		
17	2,187	3.16	(HINES)		
21	1,618	2.34	(ST. LOUIS)		
18	1,085	1.56		#5 - 8,793	12.69
20	4,398	6.35	(HOUSTON)		
22	922	1.33			
23	1,190	1.72			
24	1,200	1.73			
25	1,711	2.47		#6 - 12.160	17.55
26	5,589	8.07	(LONG BEACH)		
27	2,864	4.13	(PALO ALTO)		
28	1,996	2.88			
TOTAL				69.278	

SCI CENTERS ARE NOTED IN PARANTHESES

It is evident from the previously cited data that the VA Spinal Cord Injury Service is in need of expansion, a finding long recognized by the VA's Department of Medicine and Surgery.

The VA has prepared two comprehensive studies of SCI veterans and the demands they will make on the VA health-care system. These studies are entitled "The Spinal Cord Injury Program Plan: FY 1980--1987" and "Estimated Bed Requirements of the Spinal Cord Injured Veteran, 1985--1990." The first noted study is a broad analysis of the VA's SCI program (to include staffing needs, medical specialities required, and other appropriate health-care matters). At the very core of the study is the assumption that the VA would construct as many SCI Centers as are needed. And, the study assumes, Centers will be placed where needed in order to better serve veterans who experience spinal cord injuries.

It should be stressed that at the time of publication, in 1980, the VA had fewer SCI Centers than it does today but was able to extend care to non-veterans on a space-available basis. Today, most SCI Centers are unable to meet even the demands placed on them by SCI veterans.

In early 1980 the Veterans Administration had 1,365 SCI beds, which is about the same number as exists today, three years later. Even though Centers have been added to the SCI Service, the size of existing facilities has been reduced by closing entire SCI wards.

At the time of its studies, however, the VA estimated that by Fiscal Year 1985, 1,845 beds as a minimum would be needed in the SCI Program. The VA admitted that this figure was low and that it was based on an assumption that only 25 percent of all SCI veterans would require hospital services in any given year. It was based, also, upon the stated assumption that there would be no more wars.

It is difficult to ascertain from the data available on SCI veterans' demographics and their usage of the VA system what exactly is the frequency of use; however, the following statistics are helpful in understanding that there existed only 1,365 VA SCI beds when the data was gathered, but the VA system treated 16,279 individual SCI veterans between FY 1976 and FY 1981:

Frequency of In-Patient Discharges for SCI Veterans from VAMC's
Fiscal Year 1976-Fiscal Year 1981

[illegible]	#	%
1	[illegible]	[illegible]
2	[illegible]	16.90
3	[illegible]	[illegible]
4	[illegible]	[illegible]
5	[illegible]	[illegible]
6	[illegible]	[illegible]
7	847	[illegible]
8	[illegible]	[illegible]
9	467	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	74	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	6	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	.006
[illegible]	[illegible]	.01
[illegible]	[illegible]	.006
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	.006
[illegible]	[illegible]	.006
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	.006
[illegible]	[illegible]	.006
[illegible]	[illegible]	.006
[illegible]	[illegible]	.006
[illegible]	[illegible]	.006
[illegible]	[illegible]	.006
	[illegible]	[illegible]

Accurate placement of new SCI facilities is as important as is the expansion of the system by the addition of more beds: the above-mentioned map, which shows the location of existing SCI Centers, and the cited discharges of SCI veterans from VA Medical Centers by districts and regions, combine to help show where new SCI Centers should be located.

Section B. New SCI Centers--Needed in Texas and the Southwest

The initial information from the SCI Study (the final study is not yet prepared) shows a definite need for increasing the number of SCI beds. There is, above all, a need for establishing additional Spinal Cord Injury Centers in the Southwest because of the great distances separating SCI veterans from existing Centers and because of the heavy usage already being placed on those Centers which surround this vast region.

Medical Region 6 includes two SCI Centers, but this Region covers an enormous area of land ranging from western Texas through California. Furthermore, the adjoining Medical Region 5 contains only one SCI Center, Houston, Texas. North of Houston there is not another SCI Center in the United States.

Palo Alto, California, and Houston serve this region: VA reports for the period ending May 31, 1982, show an occupancy rate of 93% for Palo Alto and 100% for Houston. These figures represent an average daily census of 28 patients for 30 beds in Palo Alto, with a total of 52 individual veterans hospitalized per month. At Houston, the average daily census for this period was 21 patients for 22 beds, and a total of 29 patients were hospitalized each month.

Quite succinctly, veterans residing in the Southwest must travel considerable distances for SCI care, only to arrive at VA Centers which are usually already filled to capacity.

i. Dallas

PVA's highest priority for the establishment of a new SCI Center is in Dallas, Texas. Demographics support establishing an SCI Center in Dallas. The Houston, Texas, SCI Center, while it may appear to be ample for the State of Texas, is not. The Houston facility's occupancy rate remains near 100 percent, according to VA reports and PVA's observations. VA reports for the period ending May 31, 1982, show that at Houston there was an average daily census of 21 patients for 22 beds, with one bed remaining in reserve for emergencies. In addition to this daily census of patients in the SCI Center, 8 other SCI veterans were hospitalized in non-SCI beds. In short, this 22-bed facility is treating on the average 29 veterans at a time.

Dallas has a general VA Medical Center, and as noted above in the table "Discharges of SCI Veterans from VA Non-SCI Facilities," this non-SCI facility treats more SCI patients than any other hospital in the VA system, and between 1976 and 1982 it treated more SCI veterans than did four of the 19 SCI Centers.

The addition of a 60-bed SCI Center in Dallas would meet only the needs of SCI veterans in that catchment area who are being treated in general hospitals: it would be a minimal (but vitally needed) addition to the SCI Service in that it would help take care of current requirements which are not being amply met. For it to address the continuing influx of SCI veterans to the Southwest, the facility would need considerably more than 60 beds.

ii. San Antonio

To further alleviate the critical bed shortage for spinal cord injured veterans in this area, PVA's second priority is the establishment of a Spinal Cord Injury Center in San Antonio, Texas. The ever increasing numbers of SCI veterans in Texas, the almost nonexistent availability of beds at the Houston SCI Center, and the size limitations which restrict the recommended expansion of the Dallas VAMC all necessitate the need for this center.

The location of San Antonio, while close to Houston and Dallas, is such that it can serve the growing area of South Texas. Additionally, the extremely strong and valuable relationship between the San Antonio VAMC and the University of Texas at San Antonio Health Sciences Center represents the type of affiliation which most adequately meets the needs of veterans.

The San Antonio VAMC currently has an existing structure that could quickly and at a relative small cost be converted into a spinal cord injury center. The utilization of station funding could accelerate the creation of a center at this facility with no significant effect on the VA's construction budget. Additionally, PVA, in visits to the San Antonio VAMC, has found the staff willing and enthusiastic in developing a spinal cord injury center.

Due to the space limitations at the Dallas VAMC that restrict the number of possible SCI beds for that facility, San Antonio is a needed corollary if the needs of SCI veterans are to be met. This center would serve a catchment area extending to the Mexican border. Presently, SCI veterans living in El Paso, Texas, must go to Long Beach, California, for care.

iii. The Southwest

PVA's third priority for the establishment of an SCI Center is in the Southwestern United States. There are several potential sites for this suggested center. The VA SCI Service and PVA consider, in the selection of a site in the Southwest (or of any other site such as has been recommended in Texas) the following five factors: availability of existing, suitable structures and land; proficiency of medical staff in disciplines critical to spinal cord injury care; strong affiliation with a medical school; readily accessible in terms of geography; and, adequate transportation systems in the area.

In a continuing review of the needs of spinal cord injured veterans, PVA has investigated potential sites for SCI Centers in the Southwest. Furthermore, to facilitate our efforts, PVA has created a Spinal Cord Injury Care Committee whose mandate is to monitor and review the Veterans Administration's Spinal Cord Injury program. This Committee is to address both distinct local problems and the broader regional and national issues regarding spinal cord injury care. As this Committee develops information on the needs of SCI veterans, its recommendations and observations will be brought to the attention of Congress and the Veterans Administration.

The sites that PVA has examined as potential SCI Center locations are Salt Lake City, Utah; Denver, Colorado; Phoenix, Arizona; and Albuquerque, New Mexico. Each of these meet some or all of the criteria that the VA and PVA feel to be essential in the establishment of Spinal Cord Injury Centers. Furthermore, each one would provide increasingly important future services that are required because of the in-migration of SCI veterans to the Southwest.

The Salt Lake City VAMC has an excellent staff and medical school affiliation. The Denver VAMC is located near the Craig Rehabilitation Hospital, which houses a non-VA SCI Center. This co-location would enable the VA to extend and to receive information beneficial to all spinal cord injured Americans.

At Phoenix, there is already an unofficial VA SCI clinic (one not part of the VA's SCI Service). Furthermore, the Phoenix area has one of the heaviest concentrations of SCI veterans in the Southwest.

Replacement of the Albuquerque VAMC is one of the VA's highest priorities, as contained in the most recent "Five Year Medical Facility Construction Plan." There are approximately 181,800 veterans in the Albuquerque service area, and it is located in a VA Medical District (25) that has approximately 718,000 veterans. Quite importantly to SCI veterans, the Albuquerque VAMC has a close affiliation with an excellent medical school, which is located only a short distance away. Furthermore, there are on the campus uncommitted grounds where a long-term SCI facility could be established in the future. (Co-location of long-term SCI facilities with SCI Centers is of paramount importance.) The VA should give serious consideration to inclusion of an SCI Center in the proposed replacement and modernization project at Albuquerque.

Section C. Geriatrics and the Demographics of SCI Veterans: Long-term Care SCI Facilities Are Needed at Houston, Tampa and Hines

There are a number of significant findings in the VA-PVA demographic study of SCI veterans which should be highlighted in any discussion of the construction requirements of the VA's medical system. That is, special attention must be given to the exigencies of aging veterans. PVA has a special concern for the requirements of aging SCI veterans.

In its examination of the demographics of SCI veterans, PVA mailed questionnaries to 97,889 veterans. These individuals were chosen to participate in this study because they had been identified by the VA's Department of Veterans Benefits by their loss of function. They were chosen because of their having (or potentially having) spinal cord injuries.

Most respondents to the questionnaries served in World War II (51%) and are over 50 years of age (64%). Sixty-four percent (64%) of all the respondents are service-connected disabled veterans, while thirty-five percent are non-service-connected. Sixty-seven percent (67%) of those surveyed responded that they use VA facilities. It was not surprising that 97% of all respondents were men, but, like them, the largest group of responding women served in World War II.

These results do not differ greatly from those reported for the general veteran population. However, it should be kept in mind that the settlement pattern by states, as shown earlier, indicate that they do not necessarily reside in the same states as do corresponding numbers/percentages of veterans, generally.

Total SCI Respondents

DISABILITY:

PARAPLEGIC - 36%
QUADRIPLEGIC - 11%
POLIO - 10%
MS - 41%

PERIOD OF SERVICE:

WORLD WAR I - 1%
WORLD WAR II - 51%
KOREA - 19%
VIETNAM - 20%
PEACE - 6%

SEX:

MALE - 97%
FEMALE - 2.6%

COMPENSATION & PENSION:

SERVICE - 64%
NONSERVICE - 35%

USE VA FACILITIES:

YES - 67%
NO - 32%

AGE:

-30 - 3.3%
31-35 - 8.0%
36-40 - 8.1%
41-45 - 5.0%
46-50 - 10.0%
50 OVER - 64.0%
UNDER 50 - 35.0%

MARITAL STATUS:

SINGLE - 12.0%
MARRIED - 68.0%
WIDOWED - 3.8%
SEPARATED - 2.6%
DIVORCED - 13.0%

PVA believes the special needs of the aging SCI veteran must be addressed in planning for VA health-care delivery in the future. In the "PVA Response to

Spinal Cord Injury Program Plan FY 1980-1987," dated March 15, 1980, PVA noted that the VA proposed to expand the SCI service nationwide from 18 centers with 1,386 beds at that time, to 23 locations with 1,565 beds.

On a level-of-care breakdown of the VA's proposal, this would provide 236 beds (15%) for intensive rehabilitation, 845 beds (54%) for sustaining care, and 484 beds (31%) for long-term care. PVA concurred with the VA that an increase in SCI beds was required and PVA has supported an increase in the percentage of long-term care beds from approximately 25 percent (the existing percentage) of total SCI beds to the projected level of 31 percent of total beds. It appears from existing data, however, that even the dedication of 31 percent of all VA SCI beds to long-term care may not prove to be adequate.

The request for improved and expanded care for aging veterans has been expressed by all veterans' service organizations, the Congress, members of the Administration, and our society in general. The questions of future funding of VA construction projects and the VA's ability to provide the best possible health-care services to aging veterans are closely related.

The present large number of older SCI veterans and the expected increase in the Sunbelt States requires prompt action by the VA to provide for their health-care needs. Aging spinal cord injured veterans are a relatively new medical phenomenon. Consequently, no serious attention has been given to their needs. However, it is important that on July 28, 1982, the Subcommittee Hospitals and Health Care of the House Committee on Veterans' Affairs conducted an oversight hearing on the needs of spinal cord injured veterans. At the conclusion of that hearing, the Honorable Ron Mottl, the

Chairman of the Subcommittee, asked the VA to begin a review of the special needs of aging SCI veterans.

Whenever SCI veterans who require long-term care are forced by bed shortages to occupy acute-care beds, a number of undesirable results occur. First, this is a waste of money, to keep persons in the most expensive beds continuously, when what they actually need is daily personal assistance and access to acute-care facilities when medical emergencies arise. This is the reason that PVA supports placing SCI Centers on the campuses of general VA Medical Centers, with long-term care SCI facilities then being attached to the SCI Centers.

Second, SCI veterans who do not require long-term care, and who do not require hospitalization, still require regularly scheduled medical checkups, to ensure that problems are diagnosed before they become critical and possibly life-threatening. When emergency situations develop, or when routine check-ups are needed, beds are too often already filled with less seriously ill SCI patients who would find long-term care actually to be more appropriate. The result is that these long-term care SCI patients must be moved out of the SCI unit to wards where the personnel are not experienced in dealing with the patients' medical needs.

Because of the bed shortage, emergency admissions mean, first, that long-term care patients must be moved about. Second, it means that SCI veterans who have examinations scheduled must be abruptly notified of cancellation and rescheduling. This can be especially frustrating for catastrophically disabled veterans who have unique travel problems that must be arranged in advance. Furthermore, the problem is aggravated when SCI veterans must plan to travel long distances for care, as is often the case in the Sunbelt States.

i. Houston

The initial information from the SCI Study shows a definite need for increasing the number of SCI beds, and one clear example of where long-term care SIC beds are needed is the Houston, Texas, SCI Center. The use of the Houston SCI Center was documented earlier, under the examination of a need for an additional SCI Center to be established at Dallas, Texas. As noted, there is at Houston a 100% occupancy rate, and the next closest SCI Center, that at Palo Alto, California, has an occupancy rate of ninety-three (93%) percent.

The Houston, Texas, VAMC has one of the most overworked SCI Centers in the nation, and there is the demand there for the establishment of a long-term care SCI facility. This facility, should it be constructed, would accomplish two things: first, it would provide expanded services and facilities for certain SCI veterans and, second, it would remove some of the burden now being placed on the Houston SCI Center by veterans who could be amply cared for in less expensive but even more appropriate long-term care facilities.

ii. Tampa

The State of Florida is a good example of where the VA has worked to meet the health-care needs of SCI veterans but where no suitable attention has been given to the needs of aging SCI veterans. Florida is currently the second largest state in number of SCI veterans treated by the VA. (Only California has more SCI veterans than does Florida.)

There are currently two designated SCI Centers in the State, which are located at Tampa Veterans Administration Medical Center and Miami VAMC. Both of these are excellent Centers and provide in-patient and out-patient care. But, PVA is especially concerned about the present and future capability of the SCI Center at Tampa VAMC to fulfill its assigned mission. This unit has 42 beds and is currently overutilized, according to VA SCI Service information.

The Tampa SCI Center now works at or within 1 bed of 100 percent occupancy on a daily basis. The unit is overcrowded and has a continuous waiting list for patient admission.

About three years ago the VA began negotiations to acquire property adjacent to the Tampa VAMC campus, upon which there was to be constructed an SCI long-term care facility and parking spaces for both VA employees and patients and visitors at the medical center. For whatever reason, internal discussions and arguments prevailed in the VA, until the agency lost the option to acquire this valuable and needed land. Now, a consortium of physicians (at least one of whom is a former VA employee) has purchased the land and is offering to sell it to the VA at approximately twice the amount that was sought by the original sellers. In short, the VA did not move in a timely manner to resolve the urgent need for long-term care SCI beds at the Tampa Center.

iii. Hines

Mr. Chairman and Members of the Committee, PVA is aware of several VA medical facilities where the health and medical care and the well-being of spinal cord injured veterans are being sacrificed because of the conflicting goals held by the VA's Department of Medicine and Surgery and its Office of Construction. The most notable, and most urgent example, is Hines VA Hospital in Hines, Illinois.

On July 28, 1982, when PVA testified before the Subcommittee on Hospitals and Health Care of the House Committee on Veterans' Affairs, we addressed the problems that exist at Hines because of the VA's failure to construct a long-term care facility for SCI veterans. Those problems should be repeated briefly at this time.

At Hines, there is a 160-bed acute care SCI Center, but there is no long-term care SCI facility. The VA's Department of Medicine and Surgery has long seen the need for a long-term SCI facility at Hines, and one was once listed in the VA's Five-Year Construction Plan. However, despite the Chief Medical Director's best efforts, no construction is expected in the near future. It is very significant that the most current Five-Year Plan does not include a long-term care SCI facility at Hines.

PVA, for eight years, has called for the construction of a long-term care SCI facility at Hines. And, the Chief Medical Director has consulted PVA for about three years concerning this project. He has agreed that the long-term care facility is needed, but the recent efforts have been dedicated to reaching a feasible alternative to the construction of the needed 40-bed long-term care facility. The alternative is to bridge the gap which exists between urgent, current demands and the construction of a suitable facility. Despite this three-year effort, no lasting solution has been reached by the VA, largely because no alternative to specialized long-term care will meet the needs of SCI veterans.

The most recent solution proposed by the VA, as of the July 28, hearing, was to contract with nursing homes for the care of SCI veterans. It was decided by those in charge of the Hines facility that sixteen (16) SCI veterans in need of long-term care would be sent on a contract basis to non-VA nursing homes. Others would be placed in the Hines VA nursing home, and still others would be dispersed throughout the existing acute-care SCI facility. (In 1981 18 such veterans were sent by Hines to non-VA nursing homes, and at least 12 were placed in similar nursing homes during 1982.)

PVA recognized several problems inherent in the original Hines proposal: in the case of non-service-connected (NSC) disabled veterans, there is a statutory prohibition against contracting for more than six months, which means that the individual SCI veteran would be transferred to a nursing home, then back to the VA long enough to renew his eligibility for contracting care, and then out again to a nursing home. It is quite likely that by the time he is eligible to return to a non-VA nursing home, the original one will be filled and the veteran must then go to a different facility and be placed in the hands of personnel who are not familiar with him or with his SCI-related health-care problems.

Second, PVA remains fearful of non-specialized nursing home care for SCI veterans (whether VA or non-VA) because of the results we have witnessed. Too often, we have seen SCI veterans returned to SCI Centers for hospitalization after episodes in such homes.

Care of SCI patients in general nursing homes as often as not ends in a worsening of the individual patient's condition for a number of reasons, and this deterioration creates a need for expensive medical treatment and causes needless suffering for the veteran.

General nursing home personnel are not trained to deal with SCI patients, and a noteworthy example of this is the incidence of decubitus ulcers, a life-threatening condition for SCI patients. Only experienced personnel can treat such patients without doing considerable harm to them, since their circulation is greatly restricted and decubitus ulcers commonly arise from bed sores, burises, and pressure sores. Non-specialized nursing homes do not have qualified, experienced personnel, and they are therefore unable to care adequately for the needs of SCI veterans.

PVA was told originally that SCI veterans at Hines would be sent only to "accessible" nursing homes, which is of little comfort to us. Having a building with accessible bathrooms, for example, is not a substitute for having a facility whose personnel are trained to deal with SCI patients. Furthermore, there is no substitute for the concern and patience possessed by those who have chosen to make careers of dealing with spinal cord injured persons: nursing home personnel too often lack this willingness to work daily with persons whose conditions are as demanding as are those of SCI patients.

The Subcommittee on Hospitals and Health Care, on December 14, 1982, conducted a hearing dedicated to examining the VA's construction plans, projects, and efforts. PVA testified at that hearing and announced that because of the Subcommittee's earlier efforts in July, a satisfactory interim solution had been reached with the VA whereby some SCI veterans would receive appropriate long-term care at Hines.

The acceptable interim solution, which arose after the July 28, hearing, and which was reported to the Subcommittee on December 14, 1982, contained the following essential elements:

- The healthiest SCI patients in the SCI unit were to be moved into the VA's new general nursing home facility;

- SCI patients who were currently medically unstable, but who were in need of long-term care, were to remain in the acute-care SCI facility until their conditions improved, at which time they were to be transferred to the nearby VA nursing home;

- SCI patients in need of long-term care but who would continue to be medically unstable were to remain in the acute-care facility;

- Seven (7) SCI-trained FTEE were to have been assigned to the nursing home specifically to care for the SCI patients.

This interim solution was reached after a meeting on October 15, 1982, at which the Veterans Administration was represented by Dr. Earl Brown, Associate Deputy Chief Medical Director, and Mr. John R. Fears, Director of the Hines VA Hospital.

PVA is pleased to be able to report that the VA has kept its promises as to methods of caring for SCI veterans in the absence of a suitable long-term care SCI facility at Hines. Still, this interim solution leaves too many SCI veterans in the Chicago area without appropriate long-term care, because only a limited number can be cared for in the Hines VA general nursing home. Furthermore, needed acute-care SCI beds are continuing to be used for long-term care, which is an unduly expensive means of caring for these veterans. This arrangement ultimately creates a shortage of specialized beds for SCI veterans who need medical treatment.

Director Fears emphasized in a memorandum of October 18, 1982, that even with the interim solution, his facility "could not solve the overall problem for long-term care until a unit is constructed," and, he added, "Dr. Brown agreed after reviewing the problem that a long-term care unit is necessary."

Mr. Chairman and Members of the Committee, as you know, long-term care is divided into five categories, with categories I and II being those veterans who require the most attention and assistance. SCI veterans normally are found in groups I and II. General nursing homes are able to care for only a very limited number of veterans who have this severe level of disability. Most nursing homes, in short, are able to attend to the needs of their occupants only if most are in category V, or those who are capable of performing all or nearly all of their daily personal care tasks for themselves.

It is very important to note, Mr. Chairman, that in the absence of appropriate specialized facilities, the best-intentioned VA hospital managers find it doubly difficult to care for SCI patients. For example, VA general nursing home staffs do not desire, as a rule, to care for SCI veterans because of the added work and responsibility they entail. Quite typically, even when hospital directors mandate that SCI veterans be consolidated in contiguous areas so that they can be given specialized care, nursing home staffs use subterfuge to disperse the SCI veterans throughout the nursing home. This is done so that no one team of employees must provide the demanding services needed by the SCI veterans. The result is that SCI veterans are dispersed and thereby put into the hands of personnel who neither know how to care for them nor who want to expend the energy and time in learning the special needs of these veterans.

It is apparent that the situation at Hines flies in the face of both good management and of the VA's ability to care for severely disabled SCI veterans. The VA is unable to respond to this emergency situation either because Congress has made available restricted funding or because this and past Administrations refuse to spend monies for the care of needy veterans.

Considering that the VA has available over $1 billion in unobligated construction funds, PVA fails to understand why the VA has failed to approve construction of the 40-bed long-term care SCI facility at Hines. Our puzzlement exists especially since health-care experts within the VA repeatedly have recognized the need for this project.

The VA's Five-Year Construction Plan is a needs assessment, not a construction plan or a funding vehicle. Nonetheless, PVA finds it very disturbing that the Hines SCI long-term care facility is not included in this plan. We are especially troubled by this omission since the VA's Department of Medicine and Surgery continues to express agreement with PVA that this construction project is urgently needed. It is also troublesome that the VA's Fiscal Year 1984 Budget request does not include a funding request for this project at Hines.

As noted earlier, PVA trusts that the construction of urgently needed VA health-care and medical facilities will be accelerated. We think that this would be very appropriate because it is a means of increasing employment opportunities and of restoring the federal infrastructure. No VA facility should be given a higher priority during this possible acceleration, or during the normal construction planning process, than the SCI long-term care facility at Hines VA Hospital.

Section D. Cost-Saving Supplements to Construction Aimed at Caring for SCI Veterans

PVA believes, based upon our on-going observations, that SCI veterans can sometimes have their health-care needs met through improved VA services which would be more cost-effective than are certain aspects of the presently-employed means of caring for them. We will briefly outline some of these services below, recognizing that should Congress have am interest in taking them to fruition there likely will be need for in-depth examination. It seems appropriate to discuss these non-construction methods of caring for the needs of SCI veterans because of the tumultuous and uncertain environment in which VA decisions are made concerning the construction of health-care facilities.

PVA does not support alternatives to VA construction, since we adamantly believe that the best method of caring for SCI veterans is in appropriate VA facilities. However, where VA facilities cannot be built because of an inadequate population of veterans to warrant the construction of them, there are means available for providing adequately for SCI veterans' routine medical and health conditions. These sources of care would be adequate for SCI veterans so long as they have access to VA SCI Centers for care whenever serious conditions arise.

First, PVA urges that consideration be given to the establishment of additional satellite clinics for out-patient treatment. This recommendation is based upon the earlier-mentioned three such clinics that already exist within the VA. These clinics have proven themselves capable of meeting many needs of SCI veterans in a timely and inexpensive manner. Furthermore, in thinly-settled areas of the nation, such clinics could save veterans (and the VA) travel costs. By means of these satellite clinics, SCI veterans would not have to undergo the rigors of lengthy travel in order to receive treatment for relatively minor SCI-related difficulties.

These satellite clinics possibly could be co-located with Department of Defense installations or stations, under VA-Department of Defense Sharing Agreements. Similar VA-DoD sharing agreements are to be implemented since passage of Public Law 97-174, the "Veterans' Administration and Department of Defense Health Resources Sharing and Emergency Operations Act." Congress clearly had arrangements in mind similar to these proposed by PVA, when it passed this legislation.

With improved sharing agreements, the use of DoD-supplied resources such as space, medical, diagnostic, or treatment equipment, maintenance, and transportation could be utilized by teams of VA health-care personnel who would examine and treat the patients. Combinations of physicians, registered nurses, rehabilitation therapists, and others could provide traveling teams to visit designated locations at specific intervals. PVA supports this concept and asks that the VA conduct further studies of its feasibility.

Second, PVA believes an expansion of the Hospital Based Home Care program would significantly improve the VA's capability of delivering high-quality care to aging SCI veterans. PVA has a number of members who have utilized this program to improve their quality of living. Every consideration should be given to placing more eligible veterans in this program.

Third, PVA supports extending the Fee Basis Home Health Care Program, because it is cost-effective and it allows catastrophically disabled veterans to maintain a viable home environment in their community. Where it has been used, the result is greater personal satisfaction for such veterans at less cost to the Veterans Administration.

Part II. JUDICIAL REVIEW OF VETERANS CLAIMS

The Carter Administration supported amending Title 38, United States Code, in a manner which would give veterans access to the federal courts, if they sought to contest a VA decision of policy. The Reagan Administration's first VA Administrator, a few days before being confirmed by the United States Senate, called a meeting of veterans' service organizations to announce that he was reversing that VA policy and the VA would thereafter oppose efforts to open courts to veterans' claims.

Presently the ultimate arbiter of veterans claims is the Board of Veterans Appeals (BVA), located in Washington, D.C. The Board is headed by a Chairman, a Vice Chairman, and a Deputy Vice Chairman. It has 15 sections and employs approximately 330 people, about one-third of whom are attorneys.

PVA feels that most of the VA's personnel who work with veterans in the field are conscientious and dedicated. They, as a rule, clearly have the claimant's well-being in mind when they process his or her request for benefits and services. Likewise, we have full trust in and respect for the Board of Veterans Appeals. This body consists of highly competent professionals who seek to apply the laws of Title 38, United States Code, as expressed in VA regulations, in a fair and equitable manner.

Despite the traditional proficiency of the VA's processing of claims and the rulings made on them, PVA fully supports amendment of Section 211 of Title 38 to allow at least a limited form of judicial review of certain VA decisions and regulations.

It should be stated at the outset that PVA does not want to see the structure of the Veterans Administration altered: presently, the BVA makes final determinations of law and of fact, and this is a body similar to others within other federal agencies. Such internal appellant bodies are necessary even if judicial review is present. Likewise, PVA desires that the VA continue its working relationship with veterans' service organizations. Groups such as PVA help veterans prepare their claims (or advise veterans that their claims are without merit) at no cost to either the government or to the individual veteran. There is no reason to upset this working relationship.

Granting judicial review for VA decisions is wholly within the power of Congress. Congress has often been tasked with creating both a new federal agency and its controlling statutes at the same time. In such situations Congress has had to predict, largely out of conjecture, what rules the agency is to apply and what laws will control the civil court review process. The situation surrounding the Veterans Administration is more structured and well-defined: the VA has been functioning for half a century and the Board of Veterans Appeals is already established with clearly defined functions.

PVA supports judicial review of law but not of fact in cases involving veterans' claims. The controlling reason for this position is that a restriction such as this would greatly limit federal courts' workload for each claim presented to them. The Board of Veterans Appeals would already have prepared the record which would serve as the evidence in the case, since de novo review would not be allowed. The court then would decide any given case on this record as a whole. (In the unlikely event that the Board had abused its authority in the handling of a case, the federal court could still re-open the case for an examination of facts.)

There is a growing body of court cases to justify court review of questions of law in individual claimants' cases. Since a 1974 U.S. Supreme Court decision (Johnson v. Robinson, 415 U.S. 361, 1974), the federal courts have heard cases dealing with the Veterans Administration on constitutional issues.

Going beyond this, some Federal Courts and Courts of Appeal have recently begun to accept jurisdiction over issues of whether the VA Administrator has exceeded his authority in promulgating regulations. In 1978, for example, the Sixth Circuit, while examining a VA regulation, refused to give an in-depth examination to the facts but ruled on the law (Wayne State University v. Cleland, 590 F.2d 627, 1978). Similar decisions were also resolved by the Eighth and Ninth Circuits in 1979 and 1980 (Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1979; Evergreen State College v. Cleland, 621 F.2d 1002, 1980). While all of these courts agree there would not be a de novo review, they have ruled on the record as a whole.

These cases indicate a marked trend in the federal courts' accepting jurisdiction of those cases where a VA regulation was at issue. It should be explained briefly that a trial de novo would mean a complete re-trial, whereas a review of the law accepts the lower fact-finder's facts as true and examines them only to the extent necessary for the reviewing court to make its decision. In all of these cases the courts accepted the record of fact as true, examining the particulars only enough to enable them to make decisions.

In mid-October 1980 the United States Court of Appeals for the District of Columbia announced specifically that it would not look beyond the record as prepared by the Veterans Administration (Middleton v. Cleland, No. 79-1843, decided October 17 1980). The court also announced that "Suits challenging the authority [of the VA Administrator] would not open the floodgates to time-consuming litigation over the merits of individual claims. Nor would they involve the courts in scrutinizing the day-to-day operations of the VA and second-guessing the Administrator on complex and technical questions."

These are very meaningful statements by the Court of Appeals for the District of Columbia: first, it is a very liberal court and one which is more likely than others to set-aside the VA's findings of fact and conduct its own investigation. Here, though, the court said that it would not go beyond making a determination of law. Second, the court said as clearly as anyone possibly could that VA cases would not clog the courts.

Litigation arose in Middleton out of the very type of situation PVA sees as being harmful to veterans under the present lack of judicial review. The court probably would not have reviewed the case except for the presence of a constitutional issue (denial of due process and the creation of an irrebuttable presumption)--most VA claims never approach this high plateau of debate and therefore are never reviewable by federal courts. Under the present system, only constitutional issues such as violations of authority in the drafting of regulations can give rise to such important matters that VA claims can be taken into the courts.

The troublesome type of situation in Middleton was that the applicant could not discern if a decision by the Administrator of Veterans Affairs was a bona fide regulation or was merely an administrative guideline promulgated only for internal use by the VA in handling claims such as those in this case. It is not always clear, when dealing with a governmental agency, which are proper regulations drawn according to law and which rules are merely for internal use as guidelines.

The court admitted in Middleton that, due to the historical lack of publication of regulations by the VA, it had some difficulty determining the difference between a VA guideline and a regulation having the force of law. (The VA, unlike other agencies, is not required by statute to print proposed regulations in the Federal Register: the Register is the medium whereby the general public is given the opportunity to comment on the manner in which the VA plans to implement programs legislated by Congress. In April 1972, however, the VA voluntarily began printing proposed regulations in the Federal Register.)

In short, this case illustrates the frightening situation in which veterans can find themselves: they are bound by formal regulations promulgated by the VA, regulations which are not easily distinguished from mere informal rules. And, unless a court finds a constitutional issue, as it did here, there is no appeal by the veteran beyond the VA, or the very agency with which he already is having a controversy.

The VA presently is not bound formally by its own regulations. That is, there is no assurance that the VA follows congressional intent when it makes a rule for implementation of statutes. PVA would not want to see the VA Administrator stripped of his authority or discretion; however, veterans deserve to know that implementation of the law is in keeping with congressional intent. Judicial review appears to be the appropriate way to assure that VA regulations are written in such a manner that they do not exceed the authority of the Administrator.

Besides providing the Board of Veterans Appeals with interpretation concerning the congressional intent behind statutes, judicial review of questions of law should greatly help alleviate some of the problems we have seen when the Executive Branch has thwarted congressional intent. The VA has had to defy congressional intent at times in order to comply with guidelines established by the Office of Management and Budget. On many occasions in the 96th and subsequent Congresses, the Committees on Veterans' Affairs have stated to the VA Administrator and to the Director of OMB that some of their rulings have not conformed to congressional intent. Yet, Congress appears more often than not to have some problem ensuring that the VA properly implements its mandates.

Legal scholars have noted the importance of the federal agencies as the "Fourth Branch" of government, a branch not specifically empowered in the United States Constitution but which have been created to assist the President and Congress in their duties. Too often these agencies have taken off on their own course, with a mind of their own. Some of these scholars worry that even in the presence of congressional control and judicial review, these agencies act secretively and are becoming the dominant and controlling force in the lives of millions of Americans.

There are nearly 30,000,000 Americans who are veterans, and their benefits and services are controlled by a virtually autonomous agency, an agency which promulgates its own regulations, decides the claims based on those regulations, and is immune from court review of its interpretations of its regulations.

It is ironic that the VA's virtual immunity either came from the United States Supreme Court or was voiced by the high court when it described veterans benefits as "privileges" and "gratuities." Of course, that statement was made nearly a century ago, in 1895, and well before Congress had stated that veterans programs and services were a viable part of our society's policies and that those programs contributed to the national defense. (Frisbie v. United States, 157 U.S. 160, 1895) It is also noteworthy that when this case was decided, the Veterans Administration did not even exist.

The Supreme Court, in 1934, again used the language it had in Frisbie and concluded that veterans had no vested legal or property right to benefits and services administered by the Veterans Administration. The Veterans Administration at that time barely existed, since it was created only four years before and had not grown into the nation's third largest agency.

It is incomprehensible to veterans who have suffered disabling wounds while serving the nation in combat or who have given of themselves maintaining the nation's vigilance in order to prevent combat from occurring, that this attitude still persists. As noted, federal courts have more recently begun to hear cases involving veterans claims if constitutional issues are present.

It is an accepted rule, today, that once Congress creates benefits for any person or class of persons, those benefits can be denied only through due process. For example, Social Security claimants are permitted judicial review of final unfavorable agency action. They are extended this right largely out of the understanding that would-be recipients have contributed to the program and thereby have a property interest. In 1970 the Supreme Court extended this interpretation and determined that welfare payments, also, are not privileges or gratuities but are legally-created benefits to which individuals are entitled if they qualify. (Goldberg v. Kelly, 397 U.S. 254, 1970)

Should judicial review become a reality some Members of Congress may be concerned that there are insufficient funds appropriated for the number of eligible beneficiaries. The United States Supreme Court, however, has answered this question, while dealing with a case involving the Bureau of Indian Affairs. The court, in Morton v. Ruiz (415 U.S. 199, 1974) stated:

> Thus if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.

This is not mere dictum by the court but is a summary of case law on the point of insufficient appropriations to provide for a designated group.

The court additionally gave a strong and clear statement that when resources are limited, as during times of fiscal constraints and budget cuts, it is especially important that agencies make rules in an open environment and apply them fairly and evenly.

The Board of Veterans Appeals lacks the independence and the authority of courts of law. As noted above, the BVA is, itself, bound by VA regulations (38 U.S.C. 4004(c)). Hence, a circuity arises when the BVA is confronted with a VA regulation that is inconsistent with congressional intent--the Board lacks the authority to overturn that VA regulation because it, too, is bound by a VA regulation. In that sense, the final VA appellate body is helpless in its resistance to VA regulations.

PVA's position is that the current VA adjudication process (no formal rules of evidence and no cross-examination of witnesses), both at the VA Regional Office level and at the Board of Veterans Appeals level, generally works well for veteran claimants. PVA therefore opposes modifying that system. However, we feel that if a veterans' service organization or an individual veteran concludes that a particular VA regulation exceeds the Administrator's authority, that either the organization or the veteran should have the right to file a suit in federal court. Such suit would result in a motion for declaratory or summary judgment in which the court would rule on the validity of the regulation in question. This process would not flood the federal courts, but would only result in the federal courts' functioning in the manner intended in the United States Constitution.

If an individual applies for any benefit and does not establish a meritorious claim, PVA strongly supports denial of the requested benefit, so long as the purpose and intent of the law have been followed and the individual has received due process.

A word of caution is in order to all veterans and veterans' service organizations: the courts, unlike the Board of Veterans Appeals, will not allow a case to be re-heard merely because a few facts have changed or because the veteran has discovered slightly different evidence in the interim between his requests. The BVA is very lenient in that veterans can bring their claims before the Board any number of times, so long as the requests are reasonable and are grounded in some merit. Once a court has ruled on the merits of a case, on the other hand, that is a res adjudicata bar and the case cannot be heard again.

It would be incumbent upon veterans' service organizations such as PVA to advise veterans very wisely before assisting them in taking their cases before the courts. Furthermore, anyone who seeks to represent others before a court of law must be a licensed attorney, and that person can be financially liable for his gross errors in judgment. It is possible, therefore, that the existence of judicial review will change the nature of veterans' service organizations, somewhat.

Furthermore, PVA has no objections to attorneys receiving reasonable compensation for their efforts, whenever they serve as counsel to veterans who pursue claims such as those anticipated during discussions of veterans' judicial review. We do not anticipate that a significant number of attorneys will specialize in veterans law and thereby reap fortunes for veterans or from the Veterans Administration. Our speculation is based on the fact that even though there are almost 30,000,000 veterans in this country, most do not look to the government for veterans benefits. Veterans law is not likely to become as pervasive as other areas of law, such as bankruptcy, which directly affects millions of Americans. Therefore, it is not anticipated that a class of lawyers will dedicate all of their efforts to handling claims for veterans.

Even if some attorneys do specialize in veterans law, if they handle veterans' claims competently and charge reasonable fees, there cannot be a serious objection to their receiving just compensation for their skill and labor.

Besides these considerations of individual veterans' claims, there is a second and very strong reason why PVA supports judicial review. In addition to desiring that veterans have the benefit of our judicial system, there is a much larger issue involved in the existence of judicial review.

Judicial review is needed if the Veterans Administration and its programs are not to be curtailed, dominated, or controlled by other federal agencies. This factor seems to PVA to be at least as important as the individual veteran's right to have his day in court. So long as entities such as the

Office of Management and Budget not only tell the VA how much money it has for various programs (this is a legitimate role of OMB as part of the Executive Branch) but also how particular regulations will be written relating to specific points of law, the VA stands in need of this protection. In the absence of judicial review, one must wonder how the VA is to protect itself from domination by other agencies. Presently the VA cannot benefit from courts' guidance and protection, and its Administrator is not a member of the Cabinet. PVA has seen that this lack of cabinet-level status has at times made the VA Administrator incapable of defending his agency on an equal footing with those Cabinet members who so often direct the affairs of the Veterans Administraton. The best example of this overreaching has been exhibited by the Office of Management and Budget: its ultra vires domination of the VA regulation-making process repeatedly has provoked objections by the veterans' service organizations and by the Committees on Veterans' Affairs.

It is an accepted principle in American jurisprudence that no law is self-enforcing. PVA has witnessed too many example of where Congress has passed legislation with clear statements of congressional intent, only to have the Veterans Administration ordered by other agencies of the Executive Branch not to implement the legislation fully. Our conclusion is, therefore, that only the constitutionally-recognized process of applying to the courts for enforcement will suffice.

PVA would like to offer particular precautions dealing with procedure and remedies which Congress should consider, as it addresses possible judicial review of veterans law by the federal courts. That is, today federal courts sometimes attempt to create appropriate remedies, in many cases where these remedies are not provided for in law. And, they sometimes characterize matters as procedural (thus being able to by-pass those provisions) which appear to be more substantive than procedural law. Therefore, PVA feels, first, that any judicial review legislation should clearly state that an individual veteran claimant's remedy is to come from those available in Title 38, United States Code.

Second, PVA feels that Congress should state clearly what is to be procedural law and what is to be substantive law. This clarification is especially important since legislation containing judicial review of veterans' claims will most likely provide for review of the record as a whole and not for trial _de novo_. A review of case law reveals that where the legislative branch fails to state clearly what provisions are procedural and which ones are substantive, courts reach differing conclusions and provide inconsistent holdings. By making clear distinctions between procedural and substantive law, Congress would be ensuring consistent interpretations and uniform precedents. The result would be that laws would be implemented more often in a manner that reflects congressional intent.

CONCLUSION

Mr. Chairman and Members of the Committee, PVA appreciates your examination of this testimony which has addressed two very important veteran issues, VA medical construction needs and veterans judicial review. In our examination of VA medical construction, PVA has concentrated largely on the construction requirements of the VA Spinal Cord Injury Service. This Service is the provider of essential services to some of the nation's most disabled veterans; therefore, PVA is certain that the Members and staff personnel of this Committee understand why PVA has concentrated on construction requirements that are needed in order to better serve SCI veterans. Some of these requirements are urgent ones, and PVA trusts that this Committee will act quickly to resolve shortages in SCI acute-care and long-term care beds.

As has been stated, PVA does have concerns for the entire VA health-care system and its construction needs. For example, after completion of revalidation, we trust that the Veterans Administration can once again begin pursuing solutions to some of the problems which surround veterans health care. Furthermore, we hope that this Committee and the VA will ensure that new revalidation proposals do not become cumbersome and thereby delay the construction or modification of VA medical facilities.

PVA has also requested that during consideration of possible employment measures in this Congress and by this Administration, emphasis will be placed on the VA's health and medical facilities as parts of the federal infrastructure which are to be renovated. Along these same lines, should there be an acceleration in the construction of needed VA health-care facilities, PVA has offered a clear example of where a long-term care facility is required, at Hines VA Hospital. The situation at HInes is crucial, and a long-term care SCI facility must be built if the needs of SCI veterans are to be met.

Included in this statement has been a brief summary of preliminary demographic data on spinal cord injured veterans. We hope that the final tabulation of this material will be completed soon. In the absence of this final report, it is already evident that the demographics of SCI veterans do not parallel those of the general veteran population, and PVA has attempted to explain some of those variations. Based on existing data, which has been collected according to the VA's revalidation studies methodology, it is clear that SCI Centers must be constructed in Texas and the Southwest in order to care for the large number of veterans in those areas. Likewise, the demographic information shows that long-term care facilities are urgently needed in Houston, Texas, and Tampa, Florida, as well as at Hines, Illinois.

Finally, PVA mentioned briefly that there are cost-saving supplements that can meet some or most of the medical and health-care needs of SCI veterans who reside in thinly-settled regions of the country. These measures, such as the use of satellite clinics (perhaps as part of the VA-Department of Defense sharing agreements), expansion of the Hospital Based Home Care program, and extension of the Fee Basis Home Health Care Program, would be effective supplements to the VA's construction plans. They will meet the routine needs of SCI veterans so long as there are adequate acute-care and long-term care SCI facilities available to meet their more serious needs as they arise. These supplements to construction should receive serious consideration by this Committee if the VA's construction process continues to be as chaotic as it has been for the past few years.

Secondly, PVA has attempted to examine possible judicial review of veterans' claims by federal courts. We believe that such a review could exist without Federal District Courts becoming engulfed, because we do not anticipate that a large percentage of veterans will have cause to resort to the court system.

PVA considers it essential that there be judicial review on the record as a whole, not on partial records nor through trials de novo. Such a procedure would require disputed claims to first go through administrative procedures, before possibly moving to the courts. Then, the review of law could be made quickly by the federal courts.

Furthermore, we have offered two particular points for consideration: first, remedies must be defined clearly as resting in Title 38, United States Code. This requirement will prevent courts from creating inappropriate remedies. Second, there must be a delineation between those provisions that are procedural law and those which are substantive law. This distinction will help ensure appropriate and consistent handling of veterans claims by the courts, and the results will be that the courts create useful precedents as they consider the congressional intent behind veterans legislation.

Judicial review is necessary because veterans deserve the right to appeal VA decisions to courts just as do others who disagree with agencies' rulings. Additionally, and perhaps even more importantly, the Veterans Administration needs protection from overreaching by other federal agencies. Only courts can enforce laws: the VA presently finds itself in the difficult position of receiving mandates from Congress which it cannot fulfill because of restrictions placed on it by other elements of the Executive Branch.

Mr. Chairman and Members of the Committee, PVA appreciates this opportunity to submit for the record its statement on VA medical construction and veterans' judicial review. While it is likely that each of the statements made on judicial review have been addressed by this Committee in the past, it is important that the Committee give special consideration of the demographics and health-care needs of spinal cord injured veterans. There is now available demographic data that documents the need for SCI Centers and long-term care SCI facilities, and this documentation shows clearly where those facilities are needed. The information contained earlier in this statement is but a summary of the large body of data that pertains to SCI veterans. PVA would gladly provide more in-depth information to the Members of this Committee, and to the Committee's very capable and cooperative staff.

Again, PVA appreciates the opportunity of presenting this statement on two very important topics of concern to veterans.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

April 19, 1983

Honorable Alan K. Simpson
Chairman, Committee on Veterans Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The staff of the Committee on Veterans Affairs has informally requested comments from the Judicial Conference of the United States with regard to the judicial review provisions of S. 636, a bill to provide for judicial review of decisions of the Administrator of the Veterans Administration, and for other purposes. We hope that this letter will adequately respond to that request.

As the general policymaking body for the Federal Judiciary, the Judicial Conference is charged with the continuous study of the needs of the Federal courts and problems which arise in Federal court administration. After carefully reviewing provisions in S. 636, we have concluded that the potential for inconsistency in application of veterans benefits, the burden imposed on already crowded district court dockets, and the amount of trial time which would be required to adjudicate veterans benefits claims strongly outweigh any benefit which might accrue from judicial review of decisions of the Administrator—either to the administration of benefits or to the veterans themselves.

In 1963, the Judicial Conference initially disapproved of legislation to provide for judicial review of decisions of the Administrator by the United States District Courts. It then recommended that such review be vested in a special Executive Branch court. Conf. Rept. March, 1963, p. 18. This position was reaffirmed by the Conference in 1978. Conf. Rept. March, 1978, p. 9.

Constantly growing caseloads in district courts and the belief that it was not practical or desirable to impose additional case filings involving veterans appeals on these courts animated a further reaffirmation of the position that the review of veterans claims should remain exclusively with a Board of Veterans Appeals or be conferred upon a new Executive Branch, Article I court. Conf. Rept. September, 1981, p. 65. In addition, the Conference noted that imposition of such a caseload on district courts would have a consequential impact on courts of appeals and, ultimately, upon the United States Supreme Court. Furthermore, if judicial review is deemed desirable by Congress, that judicial review should be limited to the review of constitutional issues and questions of statutory interpretation. This view was again reaffirmed last fall. Conf. Rept. September, 1982, p. 65.

The Judicial Conference emphatically disapproves of legislation that would impose repetitive review of factual questions concerning the provision of veterans benefits upon the district courts. S. 636, § 302(a)(2), adding 38 U.S.C. § 4026, makes some progress toward meeting this criticism, but the bill falls substantially short of the mark.

A review of several of the provisions established under § 302(a) of the bill may be of assistance to you in understanding the concerns of the Judicial Conference. Changes which we here suggest should not, however, be equated with an endorsement of any bill which might include them.

Section 4025(b), as added to 38 U.S.C. by the bill, would provide for judicial review in the district courts of certain decisions of the Administrator adverse to a claimant. In 1978, the Department of Justice estimated that approximately 4,600 cases were likely to arise from judicial review of veterans claims. The Department of Justice noted in 1982 that this estimate was outdated and additional cases were likely. In light of present Congressional and Executive consideration of major problems such as the effects of testing of nuclear weaponry and Agent Orange, we must suggest that past estimates may well be even more inaccurate an understatement than the Department assumes them to be. The systemic burden and appropriations consequences of implementing judicial procedures for these types of cases will be substantial, and Congress may conclude that they should not be incurred in a time of economic austerity. While a definite number of cases can not be accurately estimated, it is clear that the number of cases continues to grow and consequential costs will continue to escalate.

Section 4026(a)(1)(A) and (B) provide authority for the district court to decide all questions of constitutional and statutory interpretation, while subsection (a)(1)(C) provides that the court shall have power to set aside decisions, findings and conclusions of the Administrator which are arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. We would tend to agree that this limited review under the APA would be appropriate, but, again, not in a district court.

Subsection (a)(1)(D) further limits the court, in reviewing the underlying facts of a decision of the Administrator, to setting aside a decision only "when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside." In order to acquire any such determination, a claimant would necessarily require the entire record before the Administrator to be filed (cf. § 4026(b)) and there is an implicit invitation to the presentation of testimony to illuminate such a standard notwithstanding the prohibition of a trial de novo by the court. See §§ 4026(c); 4027(a)(2)(B).

Subsection (a)(2) requires an additional step before the court might set aside any finding of fact under paragraph (1)(D) of secton 4026: that the court specify the deficiencies in the record upon which the court would set aside such finding and remand the case to the Administrator. The court would also be required to "police" the review time of the Administrator or return the case to the docket. The added time and associated expense of implementing this provision by the district court is not justified; rather a simpler process of rehearing before the Administrator prior to filing of a case in court would be more appropriate, expeditious and efficient.

Section 4027(a)(1) provides that the Administrator may move for a remand prior to the expiration of time for filing an answer. See, Fed. R. Civ. P., Rule 12(a). This remand would appear to be discretionary on the part of the Administrator, and independent of any remand that the court might order prior to finding a deficient record. Thus, each individual case may require substantial judicial administration and be remanded and removed on at least two occasions. Again, we must suggest that a more appropriate method would be to provide for a rehearing before the administrator if the claimant feels that the record is insufficient to support the conclusions drawn, by whatever standard.

These provisions of S. 636 construct a version of judicial review of agency action which is similar to general judicial review of administrative actions by the United States Courts of Appeals, not the United States District Courts. While the review is quite limited, the function is placed in a judge who is not normally so constrained. Accordingly, we must suggest that a more appropriate mechanism would be found in the structure and review provisions applicable to the Tax Court. 26 U.S.C. SS 7481 et seq. (1976).

If your major concern is that judicial review of decisions of the Administrator be limited to constitutional questions and statutory interpretation, an appellate tribunal model is a more appropriate type of forum for that process. If your major concern is consistency of decision and independent review of the decisions of the Administrator, an appropriate answer would be the creation of an Article I body in the Executive Branch similar to the Tax Court. This would also be the most appropriate response to a concern for efficient and economical service to veterans. In none of these cases would the United States District Courts appear to be an appropriate forum. Accordingly, while the Judicial Conference opposes enactment of judicial review of decisions of the Administrator with regard to veterans benefits as a general proposition, the Conference would strongly prefer the establishment of an Article I, Executive Branch court for the initial review of these "public rights," with a properly limited review in the Courts of Appeals.

Very truly yours,

Leland E. Beck
Counsel

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W. SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

May 6, 1983

Honorable Alan K. Simpson
Chairman
Committee on Veterans Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter requesting the views of the Administrative Conference on S. 636, the Veterans' Administration Adjudication Procedure and Judicial Review Act, and, especially, on the judicial review provisions of the bill.

S. 636 is designed to improve the adjudicative rights of individuals claiming Veterans Administration benefits. In particular, the bill would eliminate the present preclusion of judicial review of VA claims and provide instead a forum and standard for judicial review of VA actions with respect to such claims.

As you may know, the Assembly of the Administrative Conference at its Eighteenth Plenary Session in 1978 considered but tabled a proposed recommendation for legislation to permit judicial review of Veterans Administration decisions. Since the effect of the action to table was neither to approve nor to disapprove the proposal, the Conference does not at present have an official position with respect to whether judicial review of VA decisions should be available. Accordingly, we shall limit ourselves to technical comments on certain of the bill's procedural provisions.

To turn to the judicial review provisions of S. 636, proposed section 4025 (to be added to title 38, U.S. Code) would provide that a claimant adversely affected by a final decision of the Veterans Administration may obtain judicial review by filing suit in the United States district court within 180 days after notice of the decision. Review would be on the administrative record compiled before the VA. The scope of review would be plenary with respect to questions of law, while exercises of discretion would be reviewed under the "arbitrary and capricious" standard. (These are the customary standards under the Administrative Procedure Act.) However, with respect to questions of material fact, VA's findings may be set aside only when "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside" (§ 4026(a)). Even then the court is not empowered immediately to substitute its own findings but to remand to the Administrator for further action.

There is also provision for mandatory remand of the case to the Administrator if he requests a remand before expiration of the time to file an answer to the complaint and for remand in the court's discretion thereafter (§ 4027).

These provisions, taken together, evidence a strong preference for resolving cases at the administrative rather than the judicial level, and this preference is quite understandable given the sharp division of opinion (demonstrated in the Conference's own consideration of this issue) over the desirability of any judicial review of these claims.

The standard for review of administrative factual determinations, "utterly lacking in a rational basis in the evidence," is unusually, and probably uniquely, narrow. It is intended to permit a reviewing court to reverse a Veterans Administration claims decision on the basis of a finding of fact "only when the court is certain that the decision was wrong." S. Rept. No. 97-466, 97th Cong. 46. We might observe, however, that the language in section 4026(a (1)(D) regarding "a manifest and grievous injustice" seems to us to call for some clarification. Given the basic requirement that the Administrator's decision be based exclusively on the transcript or recording of testimony and the other items of the administrative record, § 4010(e), it would seem that where a finding of *material* fact made in reaching a decision is "utterly lacking in a rational basis in the evidence," that decision would necessarily be a manifest and grievous injustice. On this reading, therefore, the "manifest and grievous injustice" language adds nothing except, perhaps, intensity. However, that language might also be read to establish a separate and additional standard for review, *i.e.*, that to vacate a finding of the Administrator the court must conclude not only that the finding has no basis in the evidence but also that the result is unjust on some balancing of the equities. Or to turn the proposition around, if the court is convinced the Administrator is wrong on the material fact but not convinced that the end result is grievously unjust, the court is directed to affirm the Administrator's action. Such a formulation seems to invite both the Administrator and the courts to depart from the law and the facts in the interest of some subjective standard of equity, and while such an approach may be acceptable where it leads to the grant of benefits which might otherwise be denied, it presents problems where the result is to deny benefits which would otherwise be granted. Accordingly, we question whether the "manifest and grievous injustice" test is the best way to express the drafters' intent that judicial review of the facts be very narrow.

In other respects we believe the judicial review provisions are well adapted to achieve the purposes of this legislation. The choice of the district court rather than the U.S. Court of Appeals as the forum for review seems justified under the circumstances. *See* Administrative Conference Recommendation No. 75-3, 1 C.F.R. § 305.75-3.

We note that section 201 of the bill would make the promulgation of rules by the Veterans Administration subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553, notwithstanding the exemption in section 553(a)(2) for rules relating to loans, grants, benefits, and contracts. The Administrative Conference has long been on record in support of amending the Administrative Procedure Act to eliminate the so-called proprietary exemption in § 553(a)(2). *See* Administrative Conference Recommendation No. 69-8, 1 C.F.R. § 305.69-8. Accordingly, we favor this provision in the bill, although we recognize that VA has by its own regulation, 1 C.F.R. § 1.12, announced its intention to conduct its rulemaking in compliance with section 553.

We trust that these comments may be helpful to the Committee in its consideration of the bill.

Sincerely,

Loren A. Smith
Chairman

Jewish War Veterans of the United States of America
1712 New Hampshire Avenue, N.W., Washington, D.C. 20009

Stanley N. Zwaik
NATIONAL COMMANDER

0383247NX/R

March 22, 1983

The Honorable Alan K. Simpson, Chairman
Senate Committee on Veterans' Affairs
414 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Jewish War Veterans of the U.S.A. strongly support the enactment this year of S. 636, which would establish judicial review of V.A. decisions. In doing so, we reaffirm our longstanding support for such legislation.

In our testimony on March 17, 1983, before the Joint House/Senate Committee on Veterans' Affairs, we urged just such legislation emphasizing veterans' constitutional rights to be able to appeal V.A. decisions to the courts. We also urged the repeal of the arbitrary, unrealistic $10 maximum lawyer's fee. It is inequitable to limit veterans' rights to appeal V.A. decisions when such constitutional rights are afforded to people who face criminal or civil charges. America's veterans have waited long enough to receive the same rights to appeal, granted to all other American citizens.

For the past two successive Congresses, your Committee and the Senate have passed similar judicial review bills, only to see them die in the House. We urge your Committee and the Senate to pass S. 636,and we hope that your immediate action on this bill will influence the House to act quickly.

We commend you and Senators Cranston and Hart for your longstanding leadership to achieve enactment of this vital piece of legislation. The membership of JWV stands ready to assist you at any time towards this goal.

Sincerely,

Stanley N. Zwaik
National Commander

cc: The Honorable Alan Cranston
The Honorable Gary Hart

THE
RETIRED
OFFICERS
ASSOCIATION
201 N. Washington St., Alexandria, VA 22314 • (703) 549-2311

March 22, 1983

The Honorable Alan K. Simpson
Chairman, Senate Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Senate Veterans' Affairs Committee will consider the bill (S.636) to establish procedures whereby veterans can receive judicial review of decisions made on claims for veterans benefits. The Retired Officers Association urges favorable consideration of this legislative proposal.

Under current adjudication procedures, the Veterans Administration operates under non-adversarial principles and in situations wherein reasonable doubt exists the claims are found in favor of the veteran claimant. However, there have been isolated cases brought to our attention in which it appears final decisions rendered by the Board of Veterans Appeals have not taken all relevant facts into account, or have misinterpreted the laws as they may apply in these cases. Though such cases are limited in number, the right to judicial review would serve to assure all veterans that they share the basic rights and guarantees granted all citizens under the Constitution.

This association strongly believes that all veterans should be authorized to obtain an attorney of their own choosing, at their own expense, to seek justice through the judicial review process.

Sincerely,

GEORGE F. HENNRIKUS, JR.
Colonel, USAF, Retired
Director, Legislative Affairs

GFHJr:bj